Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

SHELLY L. MANN; ROBERT W. THORSON, individually and as representatives of the class, and BEVERLY KISH,

Petitioners,

-vs-

PATRICK J. CONLIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the complaint, filed under Title 42 §1983, alleging the adoption of unconstitutional rules, acts done without subject matter jurisdiction, and administrative acts, by a state court judge, should have been dismissed based on judicial immunity.

2. Whether the Younger doctrine bars an action for declaratory judgment and injunctive relief in Title 42 § 1983 cases.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Shelly L. Mann, Robert W. Thorson, and Beverly Kish, on behalf of themselves, and, on behalf of the class they desire to represent, respectfully petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit in this case, docket No. 93-1395, is reported at 22 F 3d 100 (1994). (Appendix, infra, pages 1a - 11a)

The Order of Dismissal, which includes the Opinion, in the United States District Court for the Eastern District of Michigan is unreported.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was decided and filed on April 15, 1994.

Title 28 U.S.C. §1254(1) confers jurisdiction on the United States Supreme Court to review the Judgment in question by writ of certiorari.

STATUTES AND CONSTITUTIONAL PROVISIONS

42 USCS § 1983 as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 USCS § 1988 as follows:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and the Title "CIVIL RIGHTS" and the Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986] . . ., the court, in its discretion, may allow the prevailing party, other than the United States, as reasonable attorney's fee as part of the costs."

U. S. Constitution, 14th Amendment:

Section 1. All persons born or

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisidction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners, individually, and representing a class of plaintiffs, are persons, identified, generally, as persons appearing before the defendant, a state court judge, who promulgates rules, and engages in conduct, in his court room and in conducting court business, resulting in repeated violations of constitutional rights. The defendant, as a circuit judge, is acting under color of state law.

The complaint alleges that while some of the violations of constitutional rights

occur while the judge is performing an adjudicatory function, the most serious violations are administrative in function, are legislative (rule-making) on subjects for which the defendant lacks subject matter jurisdiction to make such rules, or adjudicative when the judge lacks subject matter jurisdiction.

The applicable statutory provisions, for subject matter jurisdiction in the District Court, for injunctive and declaratory relief and for damages, are 42 U.S.C. § 1983, 28 U.S.C. §§ 1331 and 1343, and 28 U. S. C. §§ 2201 and 2202 to secure rights, privileges, and immunities secured by the United States Constitution. Attorney fees are authorized for actions under 42 USC § 1983 by 42 USC § 1988.

Plaintiffs Mann and Thorson filed an Amended Complaint before service on

Defendant (to correct minor errors). To avoid confusion, it will be referred to herein as the "Complaint," not "Amended Complaint". Defendant, without answering, filed a Motion for Judgment on the Pleadings, along with a Notice of Hearing that the motion would be heard on a date and time to be set by the Court. Plaintiffs answered the motion. Defendants filed a reply. The District Judge never set a date for a hearing. No oral arguments were held.

Proposed Intervenor Kish filed a Motion to Intervene. Defendant answered the motion. No date was set for hearing this motion by the Court.

The District Judge granted defendant's Motion for Judgment on the Pleadings in an order entitled "Order of Dismissal" signed 2/12/93. The Order of

Dismissal was a final order that disposed of all of the plaintiffs' claims, including the claims of Appellants Mann and Thorson, the class of plaintiffs they proposed to represent, and the claim of Proposed Intervenor Kish. Appellants filed a timely appeal of right to the United States Court of Appeals for the Sixth Circuit pursuant to 28 USCS § 1292(a) on March 11, 1993.

Since the District Judge dismissed the case for failure to plead a cause of action, the facts pleaded in the complaint are taken as true and form the factual basis for this Petition for Writ of Certiorari.

This complaint pleads a class action, seeking damages, declaratory and injunctive relief, against a state court judge. The complaint alleges the

constitutional violations, under color of state law, to state a cause of action under Title 42 §1983.

While the named plaintiffs request damages caused by the violations of their constitutional rights, the declaratory judgment and injunctive relief requested is primarily for the benefit of the class. (See paragraphs 6-18 of complaint, appendix B, pages 15a to 27a)

The complaint pleads "frequent" and "repeated" violations of the litigants' constitutional rights, especially in the area of family law. The nature of these constitutional violations are such that the right of appeal does not remedy the wrong. This is true primarily for two reasons, (1) constitutional violations, such as requiring a litigant to pay money before he can have hearing (to which the

litigant is entitled), would be moot issues before it could be heard on appeal; and (2) when the defendant judge is reversed on appeal, he does not change his practices, his own rules, however wrong they may be.

The constitutional violations alleged include, especially, denial of due process rights, including denial of the right of access to the courts. (See paragraphs 8-10 of the complaint, appendix B, pages 16a-20a)

In anticipation of the defense of judicial immunity, the complaint alleges (1) that the judge's acts were administrative, (2) that if the acts were in a judicial function, that he acted without subject matter jurisdiction, (3) that his acts amounted to rule-making, rules for all cases before him,

administrative rules that he had no jurisdiction to make, and which violate constitutional rights. (paragraph 11, Appendix, pages 20a-24a)

The rule-making power is vested in the legislature or the Michigan Supreme Court. The complaint alleges that these are rules applied to plaintiffs, generally, in similar circumstances, and not specifically to the named plaintiffs, who are only 3 of the victims.

The best specific example, as pleaded, is a rule in defendant's court that, in spite of the law that a judge cannot implement a friend of the court recommendation for a change in custody until after a hearing is held, this defendant judge always implements the recommendation, and then has a hearing. (see Complaint, paragraph 36d, and

Complaint of Intervening Plaintiff Kish, paragraph 7, Appendix C, page 56a) This practice is expressly prohibited by Michigan law. (See Mann v Mann, appendix D, page 66a) The complaint alleges that the defendant judge followed this rule in Shelly Mann's case. By the time that there was a hearing, as it was with Shelly Mann, the damage was already done. See Mann v Mann, 190 Mich App 526, 529, 476 NW2d 439 (1991) [Appendix D, page 69a] wherein the Michigan Court of Appeals states as follows:

"The court further explained that it was the court's practice under these circumstances to adopt and implement the recommendation until the hearing de novo could be held."

Another example is that in Shelly Mann's case, the judge insisted upon

holding a hearing while the jurisdiction was vested by Michigan Court Rule [MCR 7.208(A)] in the Court of Appeals. Because the undersigned attorney persisted the judge phoned the Court of Appeals and temporarily stopped the hearing. Intervenor Kish was not so fortunate, orders were entered in her case by the defendant judge for almost two years, seriously and adversely affecting her life, while the jurisdiction was vested in the Michigan Court of Appeals. (See, paragraph 4, Appendix C, page 54a)

Plaintiff Thorson's claim, as pleaded, alleges three incidents when the defendant judge stated that he could have a hearing (due process rights and right of access to the courts) only after he had paid money. On one occasion the defendant judge ordered that he would hold a hearing

on the issue of whether or not a proposed order conformed to a prior record only if Thorson paid $500 to his wife's attorney by noon of that same day. He did not have the money; therefore, the order was signed without any hearing as to whether or not the order conformed to the previous court record.

These practices are administrative. They are not orders made in the process of adjudicating. Discovery in the case (if it is re-instated) is likely to produce more evidence that these are rules and practices in the defendant's court.

The District Judge ruled that the defendant is entitled to absolute judicial immunity and that the court would abstain under the Younger doctrine with regard to the prospective declaratory and injunctive relief requested. The United States Court

of Appeals for the Sixth Circuit affirmed on both issues.

Plaintiffs claim that both the District Court and the Court of Appeals failed to consider the complaints in a light most favorable to plaintiffs in that they ignored the allegations of the complaint that plead a cause of action for which there is no judicial immunity, and the Younger Doctrine does not apply to a Title 42 § 1983 case, especially when the plaintiffs request prospective declaratory and injunctive relief against the practices of the court as compared to an actual interference with a pending state proceeding, which is not requested.

REASONS FOR GRANTING THE PETITION

I. This is a nationally important case.

There are conflicting decisions among the circuits on the questions presented, and the judgment of the Court of Appeals is erroneous; however, it is the opinion of this brief writer that the most important reason for granting the petition is the national importance of the issues. This should present a relatively rare opportunity for this Court to address the available remedies for litigants wronged, and a class of litigants likely to be wronged in the future by a state court judge, upon facts taken as true from an unanswered complaint. It is that consideration that has encouraged the filing of this Petition, and strongly

supports the granting of a writ of certiorari.

The responsibility of the judiciary, and the bar, in these times is awesome. The temptation to shrink from that responsibility is great. Often I tell my friends that lawyers are paid fighters. While I do not like to think of myself that way, I do see the benefit from sane, controlled fighting in the courts, with trained lawyers and judges, following rules. The alternative is fighting in the streets, as people take the law into their own hands. Why? Because the legal system is currently in a downswing - failing to meet its awesome responsibility.

If our leadership at the bar, especially our judges, can not handle that responsibility, and administer justice according to the Constitution, laws, and

rules, then I question whether or not our judges deserve any judicial immunity, and that the entire subject should be revisited with the goal of achieving more balance between the right of the judiciary to remain independent, and the right of the public to obtain redress of wrongs when the wrongs are caused by the very arm of our government charged with the responsibility of the enforcement of rights.

This Court knows how to balance rights. On the one hand we need judicial immunity to remove a judge's "fear that unsatisfied litigants may hound him with litigation charging malice or corruption." Pierson v Ray, 386 U.S. 547, at 554, 87 S Ct at 1218; Finale v Sheehy, 385 F 2d 866 (1967). On the other hand we should "allow absolute immunity to extend no

further than is absolutely necessary to protect the integrity of an official's decision making process." Johnson v Kegans, 870 F2d 992 (5th Cir. 1989).

Judge Conlin's rules are administrative - not substantive - not adjudicative - not in the process of decision making. The Court of Appeals must have misunderstood when they said "the fact that a judge's orders follow a certain pattern does not automatically convert them into 'rules'." We never alleged a "pattern" such as a judge always deciding for the mother in a custody case. His rule is to implement the recommendations of the friend of the court, whatever they are or whoever they are for, and then hold the hearing, hear the evidence, later. Or, as in Plaintiff Thorson's case, pay money now, and then,

after you do, I'll hear your case. They are rules (contrary to law and the Constitution) not a pattern. And I am appalled that Justice Boggs would liken that practice of Judge Conlin to the opinions of the justices of this Court on the death penalty, citing Callins v. Collins, 114 S Ct 1127, 1130 (1994) and Sullivan v Askew, 434 U.S. 878, 98 S Ct 232 (1977). [See Appendix A, page 9a]

These litigants are not criminals - yet this judge tries them on out of court recommendations and whether or not they can pay - without a trial. And it is in the area of family law where judges need to act almost as if they were social engineers. They are called upon to make decisions having major impact on the private lives of children and law-abiding citizens who would not be in court but for

the breakdown of their families. Procedural rules and guidelines are set forth to guide lower court judges in their Solomonic tasks. When a judge such as Judge Conlin systematically ignores those rules and guidelines and instead uses rules of his own ("Conlin law") that abort the safeguards of process and deny the rights of parties, and the appeal process is insufficient remedy, then we have a serious problem that must be addressed. Such rules are like imposing the death penalty, and having the execution, on the recommendation of the police, before there are any proceedings in court. While that is an exaggeration, wasn't that the original reason for the §1983 legislation - preventing lynching under color of law.

This case is especially important, to me as a principled attorney, and to the

citizens of our nation who do not know what to do to protect themselves, to withstand the unbridled wielding of power by a judge who does not accept that he is obligated to administer his court room, if not with psychological understanding and kindness (as would be ideal), but at least with a minimum respect for people, for the United States Constitution, for law, and for rules, time tested, and duly adopted.

The complaint, and the intervening plaintiff's complaint, plead a cause of action under Title 42 USC §1983. These are not pro se complaints, the plaintiffs are not disgruntled litigants. This case involves serious charges against a judge who, as alleged, is doing a lot of harm, to a lot of people.

II. The granting under FRCP 12(b)(6) of the motion to dismiss by the District Court and affirmed by the Court of Appeals was erroneous and in conflict with Conley v Gibson, 78 S Ct 99, and a better reasoned opinion of the Fifth Circuit.

The standard for deciding whether or not to dismiss a complaint for "failure to state a claim upon which relief can be granted", pursuant to FRCP 12(b)(6), was established by the United States Supreme Court in Conley v Gibson, (1957) 355 US 41, 2 L Ed 2d 80, 78 S Ct 99. This Court held as follows:

"a complaint should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled

him to relief." 355 US 41, at 45-46.

FRCP 15(a) provides in part that leave to amend "shall be freely given when justice so requires." FRCP 15(a) and Stern v United States Gysum, Inc., 547 F2d 1329 (7th Cir 1977).

The District Court cited Westlake v Lucas, 537 F2d 857 (6th Cir 1976) and stated its understanding of the law as follows:

"In reviewing a motion to dismiss, all allegations are taken as true and the complaint is construed in the light most favorable to plaintiff." (R.9, Order of Dismissal, p. 2, Record p. 83)

The District Court's dismissal of the plaintiffs' complaints based upon FRCP 12(b)(6) was clearly erroneous. The Court of Appeals paid lip service to the law established in Conley v Gibson, supra.,

and then proceeded to interpret the facts as they wished them to appear to support the dismissal based on judicial immunity.

This is not a case where the dismissing judge ruled that a particular allegation was missing from the complaint. It is rather a case where the judges of both the District Court and the Circuit of Appeals chose to adopt their own theory from the complaint (ignoring other allegations) and fitting them into a posture that would support an opinion to dismiss. This treatment conflicts the law as stated by this Court in Conley v Gibson, supra, and with the Fifth Circuit in Elliott v Perez, 751 F2d 1472 (1985). In the Elliott case the dismissal by the district judge "prior to any discovery or responsive pleadings" was vacated and remanded. The case contains a discussion

pleadings and the contrary, the need for specific facts upon which to base the granting or denial of dismissal based upon a claim of judicial immunity.

The solution found by the Fifth Circuit makes much sense to me. Reference is made in the Elliott case, 751 F2d at 1481, to the fact that counsel for plaintiff, in signing the complaint "is affirming that, after reasonable inquiry, he believes in good faith that the defendant official can not successfully show he has the defense of immunity." Facts are pleaded to defend against the anticipated defense of judicial immunity. If, however, the complaint was not specific enough, then, the district judge, as suggested in the Elliott case, 751 F 2d at page 1482, "should <u>on its own</u> require of the plaintiff a detailed complaint

alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained." [emphasis added]

Plaintiffs in this case never had the benefit of the judicial analysis required by Conley v Gibson, supra, nor the opportunity to defend against summary dismissal that the Elliott court would have afforded them.

Why did the District Court Judge throw the damage claim out based on judicial immunity when the complaint pleads facts in avoidance of judicial immunity? Why did the Sixth Circuit, in affirming the District Court treat the case so differently than it was pleaded? Why did the Sixth Circuit rule that there

are no set of facts under which the plaintiffs could prevail, and state, categorically, that the facts of this case do not rise to the level of rule-making. Are not these matters to be resolved at a trial? Are we, as members of the bar, that afraid to police ourselves that we need to quickly dispose of cases against judges? As stated in Elliott v Perez, supra it was the "Quick Abort in Federal Court."

III. The Court of Appeals opinion with regard to its understanding of the law and the application of judicial immunity to this case is erroneous and in conflict with decisions of this Court and other Circuits.

The law regarding judicial immunity

has been developing in this Court over many years. Stump v Sparkman, 435 US 349, 55 L Ed2d 331, 98 S Ct 2862 (1978); Bradley v Fisher, 80 US 335, 20 L Ed 646 (1872); Pierson v Ray, 386 US 547, 18 L Ed 288, 87 S Ct 1213 (1967); Butz v Economou, 438 US 478, (1978); Supreme Court of Virginia v Consumers Union, 446 US 719, 64 L Ed2d 641, 100 S Ct 1967 (1980); Pulliam v Allen, 466 US 522, 80 L Ed2d 565, 104 S Ct 1970 (1984); Forrester v White, 484 US 219, 98 L Ed2d 555, 108 S Ct 538 (1988); Mireles v. Waco, 112 S Ct 286, 116 L Ed 2d 9 (1991); and Antoine v. Byers & Anderson, Inc., 508 U S ____, 124 L Ed 2d 391, 113 S Ct 2167 (1993).

In Forrester v White, supra, this Court held that, in deciding whether or not there is immunity, an analysis of the function must be made. For example, if

the judge is sued for the discharge of a secretary, he is sued for an act in an administrative function and not for anything flowing out of his judicial function.

The Consumers Union, Pulliam, and Forrester cases have advanced and changed the laws regarding judicial immunity as ruled in the Stump case. The Consumers Union case is important because it identifies another immunity as relevant to the judiciary, that is, legislative immunity, and contains the strong dicta that judges may be enjoined for enforcement misconduct. The Pulliam case establishes the law that prospective declaratory judgments and injunctions, with attorney fees to the prevailing plaintiff, are appropriate in §1983 even under facts where the Defendant Judge is

protected from damages because of judicial immunity. The Forrester case holds that a judge may be liable in his administrative function for discharging an employee.

The functional approach is discussed again by this Court in the Antoine case. In discussing the reporter's function in the court room, this Court states that the job "requires no discretionary judgment." Antoine v Byers & Anderson, Inc., supra, 124 L Ed 2 391, at 395. At page 399 this Court discusses in detail the policy of this Court in protecting by judicial immunity the function of "discretionary decision making that the doctrine of judicial immunity is designed to protect." It is this discretionary "independent and impartial exercise of judgment vital to the judiciary" that "might be impaired by exposure to potential damages liability"

It is the opinion of this brief writer that the allegations against the defendant judge in this case are allegations of actions that do not rise to the level of discretionary, independent, and impartial exercise of judgment. They are rules applied, without foresight or judgment. They are unconstitutional rules, denying due process and access to the courts. Los Angeles County Bar Ass'n v. Eu, 979 F 2d 697, 706 (9th Cir. 1992); Chrissy F. By Medley v. Mississippi DPW, 780 F Supp 1104, 1126-7 (S.D. Miss 1991). No adjudication is made in the application of his rules. No discretion is exercised; no evidence is heard, no findings are made.

When a decision is made not to hear a case at all, the decision is administrative, not adjudicatory. In

Public Citizen, Inc. v. Miller, 813 F. Supp 821 (N.D. Ga. 1993), a parol board refused to hold a hearing. The court stated, at page 820, that "Defendants made a decision, independent of the merits of Plaintiff's application, not even to consider the application. Such a decision is administrative in nature, and not adjudicatory."

In the Consumers Union case, this Court correctly ruled that a state Supreme Court in promulgating rules for lawyers, is acting in a legislative function, not in an adjudicatory function. As stated in Tenney v Brandhove, 341 U.S. 367, 71 S Ct 783, 95 L.Ed. 1019 (1951), the policy behind legislative immunity is to protect legislators from "deterrents to the uninhibited discharge of their legislative duty. . ."

But legislative immunity, like judicial immunity, can be lost when the actors are not performing within that function, or with total absence of subject matter jurisdiction.

A mayor exercising a veto power has been held to have legislative immunity. Hernandez v City of Lafayette, 643 F. 2d 1138, 1194 (5th Cir. 1981); Calhoun v St. Bernard Parish, 937 F. 2d 172 (5th Cir. 1991) However, a major has been held to have acted without authority when he implemented a policy to take away the right of citizens to apply for handgun licenses. Kellogg v. City of Gary, 562 N.E.2d 685 (Ind. 1990) In House Speaker v Governor, 195 Mich App 376, 384-385; 491 NW2d 832 (1992), the Michigan Court of Appeals ruled that the Governor, and legislators, are not immune "when acting

outside their 'sphere' of authority."

In Michigan, as in other states as well, the authority for adopting court rules is in the Supreme Court. Article 6, Section 5, of the Michigan Constitution, provides that "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure of all courts of this state." Abick v State of Michigan, 607 F Supp 687 (D.C. Mich. 1985); Alia v Michigan Supreme Court, 906 F 2d 1100 (6th Cir. 1990).

MCR 7.208 entitled "Authority of Court or Tribunal Appealed From" provides as follows: "(A) Limitations. After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by

stipulation of the parties, or as otherwise provided by law." revised as of January, 1994.

"When a party objects to a Friend of the Court recommendation regarding a change in custody, a court cannot permanently change custody without first holding a hearing de novo." Crampton v Crampton, 178 Mich App 362, 363, 443 NW2d 419 (1989); Mann v Mann, supra.

The opinion of the Court of Appeals in this case and also in the case of Sparks v. Character and Fitness Committee of Kentucky, et al, 859 F2d 428 (1988) shows that the Sixth Circuit's views on judicial immunity are far more limiting (that is, immunity granted more broadly) than the decisions of the United States Supreme Court intended.

Therefore, as a summary to this

section, the complaint pleads a cause of action from three different analyses.

Judge Conlin is acting in an administrative function (not adjudicating) (1) when he implements administrative recommendations prior to holding any hearing, and (2) when he requires money to be paid before a litigant could have a hearing.

Judge Conlin is acting without subject matter jurisdiction when he continues to adjudicate while cases are pending in the Court of Appeals.

Judge Conlin is acting without subject matter jurisdiction when he legislates, makes his own rules, contrary to Michigan Court Rules, and Michigan law.

IV. The Court of Appeals opinion, apparently not wanting to rule for

plaintiffs with regard to the request for prospective declaratory and injunctive relief even when a judge is protected by judicial immunity, erroneously, and in conflict with several other circuits, dismissed the prayer for declaratory and injunctive remedies by application of the Younger Doctrine.

Even when a judge is immune from damages for his judicial acts, declaratory relief and injunctive relief is available to plaintiffs to protect against the prospective invasion of constitutional rights. Supreme Court of Virginia v Consumers Union, supra; Pulliam v Allen, supra; Slavin v Curry, 574 F2d 1256 (CA5, 1978); Hansen v Ahlgrimm, 520 F2d 768 (CA7, 1975). Holeman v Elliott, 732 Fed Supp 726 (D.C. Texas 1990); Guerin v

Riley, 573 Fed Supp 573 (D.C. NJ 1983); Fowler v Alexander, 478 F2d 694 (CA4 1973).

The Younger doctrine test, as explained in Carras v Williams, 807 F2d 1286, 1290 (CA6, 1986), requires (1) that a federal court is called upon to enjoin an ongoing state case, (2) the proceeding implicates vital state interest, and (3) the proceeding provides an adequate opportunity to raise constitutional challenges.

The Younger abstention doctrine is applied to cases where there is state interest in the issue and the federal courts want to let the state courts act first. A recent example is found in the issue decided in Mead v Batchlor, 435 Mich 480; 460 NW2d 493 (1990). In that case the Michigan Supreme Court following the

case of Lassiter v Department of Social Services, 452 US 18, 101 S Ct 2153, 58 L Ed2d 640 (1980), ruled that persons who face possible incarceration for non payment of child support are entitled to appointed counsel. That has been the law as it developed around the United States; however, Michigan was one of the later states to adopt it. The Western District of Michigan following the Younger Abstention Doctrine in Cobb v Green, 611 F Supp 873 (WD Mich, 1985), declined to decide the issue, deferring to the Michigan Supreme Court; however, later, the Eastern District of Michigan in McKinstry v Genesee County Circuit Judges, 669 F Supp 801 (ED Mich, 1987) did not follow the abstention doctrine on the same issue and required the "Michigan court to comply with the constitutional

requirements."

The above example was relied upon by Defendant, and by the District Judge in the Order of Dismissal. It was not a §1983 case.

The abstention doctrine established in Younger v Harris, 401 US 37, 91 S Ct 746, 27 L Ed2d 669 (1971) is not applicable to cases arising out of Title 42, §198. Stradley v Anderson, 456 F2d 1063 (CA8, Neb, 1972); Douglas Research and Chemical Inc. v Solomon, 388 F Supp 433 (ED Mich, 1975); Brown v Bronstein, 389 F Supp 1328 (SD NY, 1975); Donohoe Construction Co. v Maryland-National Capital Park & Planning Commission, 398 F Supp 21 (DC Md, 1975). This Court declined to reach the question of the applicability of Younger v Harris, to §1983 damages cases in Deakins v Monaghan,

484 US 193, 98 L Ed 2d 529; 108 S Ct 523 (1988).

In deciding that the Younger Doctrine prevented the District Court from considering the granting of declaratory or injunctive relief, the Court of Appeals cited Parker v Turner, 626 F.2d 1, (6th Cir. 1980) The dissent in the Parker cases notes that the Younger doctrine should not apply when the plaintiff seeks no interference with pending state court cases. In fact, it is noteworthy that Justice Boggs, the author of the opinion in this case, asked undersigned counsel at oral argument if Plaintiffs sought injunctive relief in pending cases, and was given the answer "no."

Neither the Court of Appeals nor the District Judge discussed the issue of the inapplicability of the abstention doctrine

to § 1983 cases. Instead the Court of Appeals chose to inaccurately characterize the request for declaratory and injunctive relief in terms of the named plaintiffs having pending cases in the Michigan Court of Appeals.

The decision of the Court of Appeals regarding Younger continues the error that permeates the entire opinion, that is, that the class nature of the complaint, and the continuing application of the unconstitutional rules, adopted by the defendant judge, without any subject matter authority, continue to be applied in the defendant's court room.

Compare the case of Page v. Grady, 788 F Supp 1207, 1213, (M.D. Ga. 1992) wherein the judge specifically notes that the "Plaintiffs do not allege that the allegedly unconstitutional acts of

Defendant Owens are part of a pattern of conduct or that others are similarly situated to them." Justice Boggs in this case makes no reference, in his opinion, to the class action allegations of the complaint. The complaint contains extensive allegations of the unauthorized, unconstitutional rule-making, and of the pattern of conduct towards others similarly situated.

There is a clear inconsistency between applying the Younger Doctrine to Title 42, §1983 cases, and the decisions of this Court in Supreme Court of Virginia v. Consumers Union, supra, and Pulliam v Allen, supra. In both cases this Court recognized that declaratory and injunctive relief was appropriate even in cases where the judge enjoyed judicial immunity while acting in an adjudicative function.

Declaratory judgments and injunctions are essential to restrain a judge from carrying out unconstitutional practices in his court room. Pulliam v Allen, supra; Timmerman v. Brown, 528 F.2d 811, 814 (4th Cir, 1975), rev'd on other grounds, Leeke v. Timmerman, 454 U.S. 83 (1981)

As noted by Stephen J. Spapiro, in his article entitled "The Propriety of Prospective Relief and Attorney's Fees Awards Against State-Court Judges in Federal Civil Rights Actions," Akron Law Review, Vol 17:1, page 25, 33-34, "if the judge's error was a single isolated incident, declaratory or injunctive relief may still be denied on the principle of mootness. . . . On the other hand, if a judge is engaged in a continued pattern of unconstitutional action, . . . the judge should not be immune from a declaratory or

injunctive suit brought to halt such action. Although the number of such suits should be small, the necessity for them in some cases may be very great."

The Younger abstention doctrine is not applicable to the facts alleged. The federal forum in which this case was filed is the court that has the jurisdiction, and the responsibility, to hear this §1983 case action for damages and for prospective declaratory and injunctive relief.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

DATED: July 13, 1994

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Supreme Court, U.S.
FILED
94 101 JUL 14 1994
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

SHELLY L. MANN; ROBERT W. THORSON, individually and as representatives of the class, and BEVERLY KISH,

Petitioners,

-vs-

PATRICK J. CONLIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0122P (6th Cir.)
File Name: 94a0122p.06

No. 93-1395

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHELLY L. MANN; ROBERT W. THORSON,
Plaintiffs-Appellants,

BEVERLY KISH,
Proposed Intervenor-Appellant,

v.

PATRICK J. CONLIN,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan

---

Decided and Filed April 15, 1994

Before: JONES, BOGGS, and DAUGHTREY, Circuit Judges.

BOGGS, Circuit Judge. The plaintiffs, Robert Thorson, Shelly Mann, and Beverly Kish, are litigants who have appeared before the defendant, Michigan Circuit Judge Conlin, in a variety of domestic relations cases. The

plaintiffs filed this 42 U.S.C. § 1983 action in federal district court, alleging that Judge Conlin's manner of conducting cases violates their due process and equal protection rights. The district court dismissed their complaint on the grounds that Judge Conlin was entitled to judicial immunity on the plaintiffs' claim for money damages and that the doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971) required the federal court to abstain from granting equitable relief. Because we find that the district court's conclusions of law are correct, we affirm.

I

The gravamen of the plaintiffs' complaint is the manner in which Judge Conlin conducts divorce, custody, and support hearings in his courtroom. Each plaintiff has a long list of complaints about Judge Conlin's conduct in his or her case. While an exhaustive litany of the plaintiffs' individual complaints is not necessary, we include a brief description to indicate the flavor of this case.

Plaintiff Thorson

Robert Thorson alleges that Judge Conlin required Thorson to pay $500 to his wife's attorney before Thorson could get a hearing on whether or not a proposed judgment of divorce conformed to the record made at the hearing. Since Thorson did not have $500 in his pocket, Judge Conlin entered the original judgment over Thorson's objections. Thorson did not appeal this order.

Several months later, Thorson appeared before Judge Conlin in a dispute regarding visitation rights. Judge Conlin allegedly told Thorson that a hearing on this issue would be scheduled only if Thorson paid the retainer for his wife's attorney, paid her attorney's fees, and agreed to be bound by the referee's findings. Thorson did not appeal this order, either.

Thorson also alleges that at a later date he asked Judge Conlin to grant an adjournment because he was ill. Judge

Conlin allegedly made the grant of adjournment contingent on Thorson paying his ex-wife $135, the amount that she claimed she was losing in wages for the day. Because he did not have the $135, Thorson alleges he was forced to proceed while ill. Judge Conlin's order was later affirmed by the Michigan Court of Appeals.

Finally, Thorson alleges that Judge Conlin forced Thorson to pay $1,535 to his ex-wife's attorney before he would set a hearing date on Thorson's motion for change of custody. Judge Conlin also allegedly refused to set the hearing until Thorson's appeal on the custody issue was resolved.

Plaintiff Mann

Shelly Mann's complaint against Judge Conlin is the result of a custody battle. Judge Conlin originally awarded custody to Mann, but her ex-husband filed a motion to change the order. A referee held a hearing and recommended that Mann's ex-husband have custody. Mann objected and requested a *de novo* hearing on the issue, to which she was apparently entitled under Mich. Comp. Law § 552.507. Judge Conlin, however, gave custody to Mann's ex-husband without granting Mann a hearing. Mann appealed this ruling and refused to turn over her children to her ex-husband. She relented after she spent 10 days in jail. The Michigan Court of Appeals held that Judge Conlin acted correctly in jailing Mann for refusing to turn over her children.

Mann's *de novo* hearing was held six months after Mann requested it, even though a court rule required Judge Conlin to hold the hearing within 56 days. He awarded custody to Mann's ex-husband, ordered supervised visitation, and set child support payments. According to Mann's complaint, this order was overturned on appeal. On remand, Judge Conlin made other arrangements that Mann found unsatisfactory.

Finally, Mann's ex-husband requested permission to move out of state with their minor children. Judge Conlin

ordered a hearing to be held within one week. During this hearing, Mann objected on the grounds of jurisdiction, claiming that the pending appeal of the earlier custody decision divested the court of jurisdiction. Mann alleges that Judge Conlin stopped the hearing, telephoned the court of appeals, and then advised Mann's ex-husband to move for a remand. Mann's ex-husband followed the judge's advice and made a motion in the court of appeals for a remand, which was granted. After remand, Judge Conlin granted Mann's ex-husband permission to move out of state with the children.

Proposed-Intervenor Kish

Beverly Kish's story is similar to Mann's. Kish was a defendant in a divorce action in which Judge Conlin granted Kish's husband a divorce. She appealed the judgment. Kish alleges that Judge Conlin continued to enter orders in her case despite a lack of jurisdiction. Most notably, Judge Conlin suspended Kish's visitation rights until she underwent a psychological evaluation. Kish did not submit to an evaluation and she apparently still does not have visitation rights.

Kish also objects to Judge Conlin ordering her to pay the total cost of securing expert testimony about her children's mental well-being. Kish maintains that Judge Conlin had previously ordered Kish and her ex-husband to share the costs. Kish, however, did not appeal this ruling. Finally, Kish claims that he was openly biased against her and showed favoritism to her ex-husband. She alleges that even when Judge Conlin granted a *de novo* hearing on the issue of custody, he made it clear from the start that he would still grant custody of the children to her husband.

Proceedings

Thorson and Mann sued Judge Conlin under 42 U.S.C. § 1983, claiming that he was violating their constitutional rights; Kish moved to intervene in the suit. The plaintiffs requested various legal and equitable remedies, including injunctive and declaratory relief. The district court,

however, granted Judge Conlin's Rule 12(b)(6) motion. The district court concluded that the plaintiffs' claims for damages were barred by the doctrine of judicial immunity. The court also dismissed the plaintiffs' claims for injunctive and declaratory relief on the grounds that the *Younger* doctrine required the court to abstain from hearing the case.[1]

The plaintiffs then filed this timely appeal.

II

The plaintiffs first argue that district court used the wrong standard when it decided the Rule 12(b)(6) motion. This court reviews *de novo* a dismissal of a complaint pursuant to Rule 12(b)(6). *In re Delorean Motor Co.*, 991 F.2d 1236, 1239-40 (6th Cir. 1993). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957).

In this case, the district court cited *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976) for the proposition that, when considering a Rule 12(b)(6) motion, all allegations must be taken as true and viewed in the light most favorable to the plaintiff. The district court concluded that "[t]he actions in plaintiffs' complaint were all conducted within defendant's judicial capacity. These actions were also within the clear jurisdiction of defendant as a circuit court judge." Although the district court did not cite the *Conley* test, it is clear from the body of the opinion that the court found that there was no set of facts that would allow these plaintiffs to recover against Judge Conlin. Consequently, the district court did not err in this regard.

---

[1]Kish's motion to intervene was denied as moot since her proposed complaint suffered from the same infirmities as Thorson's and Mann's complaint.

The plaintiffs also suggest that the district court abused its discretion in granting Judge Conlin's motion without first hearing oral argument. It is within the district court's discretion to expedite a case by ordering "the submission and determination of motions without oral argument . . . ." Fed. R. Civ. P. 78. The district court did not abuse its discretion in this respect, as will become clear in the discussion of the merits of the plaintiffs' case.

Finally, there is also a suggestion in the plaintiffs' brief that the district court should have allowed them to amend their complaint if the facts were insufficient to state a claim. The plaintiffs, however, never requested leave to amend their complaint and this argument is not properly before this court. *Pinney Dock & Transp. Co. v. Penn Centr. Corp.*, 838 F.2d 1445, 1461 (6th Cir.), *cert. denied*, 488 U.S. 880, 109 S. Ct. 196 (1988).

III

The plaintiffs contend that Judge Conlin is liable for money damages because he acted without jurisdiction, beyond his jurisdiction, in a non-judicial capacity, and in a legislative capacity. "[G]enerally, a judge is immune from a suit for money damages." *Mireles v. Waco*, 112 S. Ct. 286, 287 (1991) (per curiam). A judge is liable for money damages in only two circumstances: (1) where the judge acts in a non-judicial capacity; and (2) where the judge acts "in the complete absence of all jurisdiction." *Id.* at 288.

When a plaintiff alleges that a judge acted in a non-judicial capacity, this court relies "on a functional analysis to determine which acts are protected, meaning that one must determine whether the actions are truly judicial acts or 'acts that simply happen to have been done by judges.'" *Morrison v. Lipscomb*, 877 F.2d 463, 465 (6th Cir. 1989) (quoting *Forrester v. White*, 484 U.S. 219, 227, 108 S. Ct. 538, 544 (1988)). "Paradigmatic judicial acts" are those that involve resolution of disputes "between parties who have invoked the jurisdiction of a court . . . ." *Forrester*, 484 U.S. at 227, 108 S. Ct. at 544. "A judge will not be

deprived of immunity because the action he took was in error . . . ." *Stump v. Sparkman*, 435 U.S. 349, 356, 98 S. Ct. 1099, 1105 (1978).

A

The United States Supreme Court has delineated types of acts by judges that are non-judicial and thus are not protected by the aegis of judicial immunity. For example, the Court has held that administrative decisions by judges are open to suit. *Forrester*, 484 U.S. at 228, 108 S. Ct. at 544. In *Forrester*, the issue was whether a state judge was immune from suit for allegedly demoting and then discharging an employee on account of her sex. The Court found that the judge's acts "may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative." *Forrester*, 484 U.S. at 229, 108 S. Ct. at 545. As we stated in *Morrison*, *supra*, the judge in *Forrester* was not entitled to judicial immunity because he was acting not as judge but "as an employer who is also a judge." *Morrison*, 877 F.2d at 465.

We applied the *Forrester* analysis in *Morrison* and held that a presiding judge was not immune from suit when he declared a moratorium on the issuance of writs of restitution by directing the clerk's office under his control not to issue any such writs regardless of other judges' orders. This moratorium prevented the plaintiff, Morrison, from retrieving some of his rental properties for over three weeks. *Morrison*, 877 F.2d at 464. We found that the judge's order was not a judicial act because it "did not alter the rights and liabilities of any parties but, rather, instructed court personnel on how to process the petitions made to the court." *Id.* at 466. We concluded that the moratorium differed from an adjudication because, in the latter case, the aggrieved party could, in most cases, appeal the court's decision, whereas an aggrieved party in the former case had no direct way to appeal an administrative order.

In this case, the plaintiffs have failed to allege any acts by Judge Conlin that fall within the definition of "administrative acts" as outlined above. The plaintiffs allege that Judge Conlin's acts of setting dates for hearings and of collecting attorney's fees that he had previously adjudged due were administrative rather than judicial acts. However, we find that while Judge Conlin's acts may have occasionally been in error or seemed unduly harsh, there is no escaping the conclusion that the offending acts are "judicial." In this case, Judge Conlin's orders affected the rights only of the individual plaintiffs in specific judicial proceedings; these acts are example of the "paradigmatic judicial acts" discussed in *Forrester* and *Morrison*. Thus, we hold that Judge Conlin was acting in his judicial capacity and is entitled to immunity for each of the allegedly "administrative" acts.

B

The plaintiffs also allege that Judge Conlin is liable for money damages because he lacked jurisdiction to enter certain orders in their cases. A judge will lose judicial immunity if he acts in the "clear absence of all jurisdiction." *Stump*, 435 U.S. at 357, 98 S. Ct. at 1105. There is a "clear absence of jurisdiction" when a court of limited jurisdiction attempts to adjudicate a case outside of its jurisdiction, such as when a probate court conducts a criminal trial. *Stump*, 435 U.S. at 357 n.7, 98 S. Ct. at 1105 n.7 (citing *Bradley v. Fisher*, 80 U.S. 335, 351-352 (13 Wall. 335) (1872)).

In their briefs and at oral argument, the plaintiffs argued that Judge Conlin acted in a legislative capacity by making rules for his courtroom. They cite *Supreme Court v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 100 S. Ct. 1967 (1980) and *Alia v. Michigan Supreme Court*, 906 F.2d 1100 (6th Cir. 1990) for the proposition that rule-making is a legislative, not a judicial, function. Since, the plaintiffs argue, the only court with jurisdiction to make court rules is the Michigan Supreme Court, Judge Conlin,

by making rules, was *a priori* acting outside of his jurisdiction.

We are not persuaded that Judge Conlin's actions in this case rise to the level of "rule-making." As a matter of course, a judge in a domestic relations case must enter orders regarding visitation, custody, and support issues. The fact that a judge's orders follow a certain pattern does not automatically convert those orders into "rules." Judges, even Justices of the Supreme Court of the United States, from time to time make declarations as to what their policy will be on future cases coming before them. *See, e.g., Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of *certiorari*) (Justice declaring that he will henceforth never vote to uphold the constitutionality of a death sentence); *Sullivan v. Askew*, 434 U.S. 878, 98 S. Ct. 232 (1977) (Brennan and Marshall, JJ., dissenting from denial of *certiorari*) (Justices declaring that they believe death penalty to be unconstitutional in all circumstances).

Here, Judge Conlin is a judge in a Michigan circuit court. The circuit court is a "trial court of general jurisdiction" and is given the exclusive power to conduct trials. Mich. Const. Art. IV, § 1. The Michigan Court Rules grant Judge Conlin the power to enter orders, such as the ones complained of here, to effectuate his judgments. *See, e.g.*, Mich. Ct. R. 3.206(A); Mich. Ct. R. 2.503(D). In light of these facts, "neither the procedural errors [the defendant] may have committed nor the lack of a specific statute authorizing" his actions renders him liable for damages for his actions. *Stump*, 435 U.S. at 359, 98 S. Ct. at 1106.

The plaintiffs have failed to allege any facts that indicate Judge Conlin's acts were either non-judicial or done in the complete absence of jurisdiction. The plaintiffs' cursory allegations are simply insufficient to state a claim against a defendant who is presumptively protected by judicial immunity. Consequently, the district court was correct in

granting Judge Conlin's Rule 12(b)(6) motion on the plaintiffs' claims for damages.

IV

The plaintiffs contend that the district court erred in dismissing their claims on the grounds that the doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971) required the district court to abstain from hearing their claim for injunctive and declaratory relief. Although "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity," *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S. Ct. 1970, 1981 (1984), a federal court should abstain from hearing challenges to a state's exercise of its jurisdiction in civil cases if the state's interest is so important that exercising federal jurisdiction would disrupt the comity between federal and state courts. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11, 107 S. Ct. 1519, 1526 (1987) (applying the *Younger* doctrine to state civil proceedings).

A federal court should abstain whenever it determines "(1) that state proceedings are pending; (2) that the state proceedings involve an important state interest; and (3) that the state proceedings will afford the plaintiff an adequate opportunity to raise his constitutional claims." *Nilsson v. Ruppert Bronson & Chicarelli Co.*, 888 F.2d 452, 454 (6th Cir. 1989). This court reviews *de novo* a district court's decision to abstain under the *Younger* doctrine. *Berger v. Cuyahoga County Bar Ass'n*, 983 F.2d 718, 721 (6th Cir.), *cert. denied*, 113 S. Ct. 2416 (1993).

Assuming that the plaintiffs have alleged facts that make injunctive and declaratory relief appropriate,[2] the district court was nonetheless correct in abstaining on the basis of

---

[2]Equitable relief against a judge, as with any other defendant, is limited to cases where there is "a showing of an inadequate remedy at law and of a serious risk of irreparable harm . . . ." *Pulliam*, 466 U.S. at 537, 104 S. Ct. at 1978 (citation omitted).

the *Younger* doctrine. First, all three plaintiffs have domestic relations cases that are all apparently still pending in Michigan Circuit Court. Second, the state proceedings involve a paramount state interest, *i.e.*, domestic relations law. *See, e.g., Parker v. Turner*, 626 F.2d 1, 4 (6th Cir. 1980). Finally, the plaintiffs have failed to show that the Michigan courts cannot or will not provide an adequate opportunity to raise their constitutional claims. Consequently, the district court was correct in dismissing the plaintiffs' claim for prospective relief.

For the above-stated reasons, we AFFIRM the district court's order dismissing the plaintiffs' claims.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SHELLY L. MANN and ROBERT W. THORSON, on behalf of themselves and all others similarly situated,

Plaintiff,

-vs-

PATRICK J. CONLIN,
Defendant.

Case No. 92CV74022DT

Shirley J. Burgoyne (P11409)
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AMENDED COMPLAINT

Plaintiffs SHELLY L. MANN and ROBERT W. THORSON, on behalf of themselves and all others similarly situated, by their attorney, Shirley J. Burgoyne, for Complaint against PATRICK J. CONLIN, state as follows:

GENERAL ALLEGATIONS

I. Jurisdiction and Venue

1. This is a class action for

injunctive and declaratory relief and for damages, pursuant to 42 U.S.C. Section 1983 and jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331 and 1343, to secure rights, privileges, and immunities established by the Thirteenth and Fourteenth Amendments to the United States Constitution. Declaratory relief is sought under 18 USC §§ 2201 and 2202. Injunctive relief is sought under 42 USC § 3613 (c) (1). Attorney fees are authorized for actions under 42 USC § 1983 by 42 USC § 1988.

2. Venue is placed in this district because it is where the defendant resides and where the events complained of occurred. Venue is based on 28 USC §1391.

II. Parties

3. Plaintiffs Shelly L. Mann and Robert W. Thorson are citizens of the

United States and residents of the State of Michigan. Robert W. Thorson resides in Washtenaw County; Shelly L. Mann resides in Wayne County.

4. At all times relevant hereto, defendant Patrick J. Conlin was a resident of Washtenaw County, Michigan, an attorney licensed to practice law in the State of Michigan, and serving as a Circuit Judge of the 22nd Judicial Circuit, County of Washtenaw, State of Michigan. He is sued individually and in his official capacity.

5. At all times relevant hereto Defendant, PATRICK J. CONLIN, was acting under color and pretense of the statutes, ordinances, regulations, cases, customs and usages of the State of Michigan, and under the authority of his office as a circuit judge of this county and state.

III. Class Action Allegations

6. Plaintiffs are members of a class composed of all persons who are citizens of the United States, or other persons, who have been subjected to acts, and the consequences thereof, in violation of their constitutional rights, by the Defendant, Patrick J. Conlin, as hereinafter alleged.

7. This class action is brought pursuant to Rule 23, Federal Rules of Civil Procedure. This class action is properly brought because:

a. The class is so numerous that joinder of all members is impracticable;

b. There are questions of law and fact common to the class.

c. The claims of the representative plaintiffs are typical of

the claims of the class and it can reasonably be expected that defendants will interpose identical defenses to any and all of such claims.

d. Shirley J. Burgoyne, attorney for plaintiffs, will thoroughly and adequately protect the interests of the class; and

e. Defendant, in acting as hereinafter alleged, has acted and refused to act on grounds generally applicable to the class.

CLASS ACTION CLAIM

8. The defendant, as a circuit judge, conducts his courtroom and court business, in particular in the area of family law, in violation of his duties, causing repeated, and frequent, deprivation of constitutional rights to litigants whose cases are assigned to him.

9. Plaintiffs in the class which the individual plaintiffs represent have been subjected, by repeated and numerous acts of the defendant, to deprivation, under color of law, of rights, privileges, and immunities secured to them by the Constitution and laws of the United States and the State of Michigan, their rights to security of person and freedom from arrest, their rights not to be deprived of liberty without due process of law, guaranteed by the Fifth and Fourteenth Amendments to the Constitution; and their rights to the equal protection of the laws guaranteed under the Fourteenth Amendment to the Constitution.

10. Defendant, PATRICK J. CONLIN, as a circuit judge, owed to the plaintiffs in the class the duty of using

due care in carrying out his functions as a circuit judge, the duty of not violating the constitutional rights of litigants appearing in his court room, the duty of not acting beyond his jurisdictional powers in his judicial capacities, and the duties of properly discharging his administrative and enforcement responsibilities according to the Constitution of the United States and the law and Constitution of the State of Michigan. In particular, his duties included the following:

a. The duty, in his judicial, adjudicative, capacity to deliberate, weigh evidence, and decide fairly, without precipitous action, or making decisions and taking sides early on (before evidence is presented), and the duty to respect the constitutional rights of privacy, family

rights, not to impute income to litigants with minor children who are public assistance, and to treat litigants with respect and without harassment;

b. The duty, in his judicial, adjudicative, capacity to not hold hearings when he has no jurisdiction;

c. The duty, in his administrative capacity to set dates for hearings on matters within his jurisdiction;

d. The duty, in his administrative capacity, to set hearing dates on contested child custody matters, as prescribed by court rules, and to set them within 56 days [see MCR 3.206(F)];

e. The duty, in his administrative and enforcement capacities, to follow the law and court rules regarding collection laws or contempt

proceedings;

f. The duty, in his administrative and enforcement capacities, not to attempt the collection of attorney fee debts by duress, by denying a litigant's constitutional right to a hearing;

g. The duty, in all his functional capacities, not to violate the constitutional rights of litigants in his court room or affected by his court business, and not to interfere with the litigants right to the assistance of counsel.

11. Defendant, PATRICK J. CONLIN, as an attorney and as a circuit judge, violated his duties to the plaintiffs in the class, and in the violation of such duties, infringed upon the plaintiffs' constitutional rights as

alleged hereinabove in paragraphs 8, 9 and 10, as follows:

a. Defendant has frequently, and repeatedly, violated the duty of using due care in carrying out his functions as a circuit judge when acting in family matters, invades the privacy of litigants, violates the rights of the family unit, fails to uphold the responsibility of the best interest of the children, and harasses litigants violating their privacy and integrity. Examples of this conduct include bizarre, cruel, and unusual methods of adjudication or to obtain compliance from litigants; making precipitous decisions; insulting and harassing parties and witnesses; taking sides with one party (often disregarding the rights of litigants and the best interest of the minor children involved)

and resulting in the other party being denied a fair hearing. He enters orders based only on friend of the court recommendations (and often only upon his own whims), and implements changes, usually in child custody and child support, and often post-judgment, without first holding an evidentiary hearing. He often holds himself to be above the law, makes his own laws, and does not follow directives from the Court of Appeals. These acts violate the litigants constitutional rights to due process and equal protection. Sometimes these acts, though improper, are within his jurisdiction and other times these acts are outside his jurisdiction.

b. Defendant has violated his duty, in his judicial, adjudicative, capacity to act within his jurisdiction,

by hearing cases that by court rule are within the exclusive jurisdiction of the Court of Appeals;

c. Defendant has violated his duty, in his administrative capacity, to set dates for hearings on matters within his jurisdiction;

d. Defendant has violated the duty, in his administrative capacity, to set hearing dates on contested child custody matters, as prescribed by court rules, and to set them within 56 days [see MCR 3.206(F)];

e. Defendant has violated his duty, in his administrative and enforcement capacities, to follow the law and court rules with regard to collection laws or contempt proceedings;

f. Defendant has violated his duty, in his administrative and

enforcement capacities, to not attempt the collection of attorney fees debts through the denial of a litigant's constitutional right to a hearing, by signing an order that requires the payment of money as a condition for the granting of a litigant's constitutional right to a hearing;

g. Defendant has violated his duty, in all his functional capacities, to not violate the constitutional rights of litigants in his court room or affected by his court business, including but not limited to his failure to follow court rules, making up his own rules, with regard to when attorney fees in domestic relations cases will be paid by the other party contrary to the standards of MCR 3.206(A) and other applicable court rules.

12. The acts of the Defendant as described above were all performed with

malice and premeditation, with knowing disregard for duty and the persons affected, under color of state law with willful and wanton disregard of Plaintiffs' rights under the United States and Michigan Constitutions and in contravention of the letter and spirit of 42 USC 1983.

13. Defendant's negligent and willful conduct and his wrongful policies and judicial procedures have caused damages for the class of plaintiffs represented by SHELLY L. MANN and ROBERT W. THORSON, including specific injuries to be alleged when the class members are identified, and including attorney fees and costs in the prosecution of this action.

14. As a proximate cause of the negligent, intentional and willful conduct

of defendant, and his wrongful policies as a circuit judge, the plaintiffs in the class represented by SHELLY L. MANN and ROBERT W. THORSON, have been deprived of constitutional rights and liberty and have suffered, and will continue to suffer, great mental anguish, trauma, and emotional upset.

15. As a result of the gross, willful and flagrant violation of Plaintiffs' constitutional rights as set out above, Plaintiffs in the class are entitled to a substantial award of both compensatory and punitive damages as full compensation for those damages caused by the acts of the defendant that are not by law protected by judicial immunity.

16. The acts of defendant as alleged herein are serious, numerous, and frequently repeated in the same, and

different cases. The plaintiffs have a right to declaratory and injunctive relief as found to be appropriate by this Court. Plaintiffs request that defendant be enjoined from continuing his illegal and unconstitutional practices and that he be enjoined from hearing family law cases.

17. In addition, plaintiffs are incurring attorney fees in the prosecution of this case and request full attorney fees as allowed by law in civil actions under Title 42 USC § 1983, as provided in Title 42 USC §1988.

CLAIM OF PLAINTIFF THORSON

18. All allegations of paragraphs 1-17 above are reallege herein by reference.

19. Plaintiff ROBERT W. THORSON is the defendant in the case of Mary Jo Thorson v Robert W. Thorson, Washtenaw

County Circuit Court Case #87-38000-DM. A Judgment of Divorce was entered on September 7, 1988. The violations of Plaintiff Thorson's constitutional rights by the Defendant Conlin began on or about May 27, 1988, and are continuing to the present time. On May 27, 1988, a settlement of the divorce case was placed on the record. On September 7, 1988, the wording of the proposed judgment was before the court; at that time the defendant ordered that Plaintiff Thorson had to pay $500 to his wife's attorney by 12:00 noon that day if he wanted a hearing on the issue of whether or not the proposed judgment conformed to the record made on May 27, 1988. Because defendant could not obtain the $500, the judgment entered did not conform to the record made on May 27.

20. On December 14, 1988, a dispute regarding visitation rights was before the defendant-judge. The defendant ordered that a friend of the court referee hearing would be held on the issue but only if the Plaintiff Thorson first paid a retainer to his wife's attorney of $500, and paid all her fees at $125 per hour before a referee hearing could be held, and the defendant ordered that Plaintiff Thorson had to agree in advance to be bound by the friend of the court recommendation. The order entered on May 17, 1989, in fact contained the provision "that the recommendation of the Friend of the Court shall be binding on the Defendant." The order contained no provision that it would be equally binding on Mary J Thorson.

21. In a hearing on May 18,

1990, the Plaintiff Thorson's attorney requested an adjournment, because her client was ill. The defendant-judge stated that he would adjourn the hearing only if Plaintiff Thorson paid $135 to his ex-wife for the amount that she claimed she was losing in wages for that day. Defendant Thorson could not pay the $135; therefore, he proceeded sick.

22. In an order dated July 13, 1992, (placed on the record on June 17, 1992), defendant ordered Plaintiff Thorson to pay $1,535 in attorney fees to Mary J Thorson's attorney as previously ordered before he would set a date for an evidentiary hearing on his motion for change of custody or refer the issue to the Friend of the Court. In the same order he stated, contrary to law and court rule, that he would not hear the custody

motion until an appeal of an order dated June 20, 1990, is fully resolved.

23. Defendant violated his duties to the plaintiff Thorson, and in the violation of such duties, infringed upon the plaintiff Thorson's constitutional rights as alleged hereinabove in paragraphs 8, 9, and 10 (a, c, d, e, f, and g) as follows:

a. Defendant breached his duty, in his judicial, adjudicative, capacity to deliberate, weigh evidence, and decide fairly. Defendant violated both the due process and equal protection clauses by ordering, on May 17, 1989, Defendant Thorson bound to the result of a referee hearing (denial of due process) and without equal treatment of Mary J Thorson (denial of equal protection) thereby made a decision or took sides early on (before evidence is presented);

b. Defendant breached his duty, in his administrative capacity, by requiring Plaintiff Thorson to pay $135 to Mary J Thorson, or proceed with a hearing while sick (on May 18, 1990);

c. Defendant breached his duty, in his administrative capacity, by refusing to hold hearings required by law and the due process clause of the constitution, and he did this several times to Plaintiff Thorson as follows:

1) defendant refused to hold a hearing on whether or not the proposed judgment conformed to the record because Plaintiff Thorson could not pay the $500 to his wife's attorney, which the judge had ordered as a condition precedent to granting a hearing on the issue;

2) defendant refused to allow Plaintiff Thorson to have a hearing

before the Friend of the Court Referee unless he first paid a retainer of $500 to Mary J Thorson's attorney and all her fees to date at $125 per hour;

3) defendant refused in the order entered July 13, 1992, to allow Plaintiff Thorson to have a hearing on his recently filed Motion to Change Custody until he paid $1,535 in attorney fees to Mary J Thorson's attorney as previously ordered on June 20, 1990.

d. Defendant breached his duties to follow the court rules when, on May 17, 1989, he ordered Plaintiff Thorson to pay a retainer and full attorney fees for his wife without first determining in an evidentiary hearing that he had the ability to pay and whether the other party needed the fees paid. [In compliance with the standards of MCR 3.206(A) and other

applicable court rules.] Defendant repeated this breach of duty again in the order of June 20, 1990, when he ordered Plaintiff Thorson to pay the $1,535 to Mary J Thorson's attorney.

e. Defendant breached his duty, in his administrative capacity, by refusing to set a hearing date on Plaintiff Thorson's motion for child custody as governed by the Michigan court rules, and by not setting it for hearing within 56 days as required by MCR 3.206(F);

f. Defendant breached his duty, in his administrative and enforcement capacities, when, on July 13, 1992, he ordered payment of $1,535, a previously ordered attorney fee, as a condition precedent to Plaintiff Thorson's having a hearing on his child custody motion

because there is no law that allows the collection of a debt or enforcement by contempt proceedings by the use of a method, duress, that states if you don't pay you don't have your constitutional right to court, a judge, and a hearing;

g. Defendant breached his duty, in all his functional capacities, by violating the constitutional rights of Plaintiff Thorson in all the violations of duty as alleged in this paragraph.

24. As a direct and proximate cause of the intentional and negligent acts of the defendant as alleged, his wrongful acts and policies, and the breaches of duty as stated, Plaintiff Thorson has been damaged by a loss of the money that he paid to obtain his rights as ordered by defendant, a loss (increasing daily) from not having a hearing on his

custody motion causing suffering upon his children and himself, has suffered monetary and emotional damages caused by the violations of his constitutional and civil rights, emotional distress, mental anguish, trauma, humiliation, and other compensatory and exemplary damages.

25. As a result of the gross, willful and flagrant violation of Plaintiffs' constitutional rights as set out above, Plaintiff Thorson is entitled to a substantial award of both compensatory and punitive damages as full compensation for those damages caused by the acts of the defendant that are not by law protected by judicial immunity.

26. The acts of defendant as alleged herein are serious, numerous, and frequently repeated in the Thorson case and are likely to continue unless

declaratory and injunctive relief is granted by this Court. Plaintiff Thorson requests that defendant be enjoined from continuing the illegal and unconstitutional practices to which he has subjected the Plaintiff Thorson, and that the defendant be enjoined from hearing family law cases.

27. In addition Plaintiff Thorson is incurring attorney fees in the prosecution of this case and requests full attorney fees as allowed by law in civil actions under Title 42 USC § 1983, as provided in Title 42 USC §1988.

CLAIM OF PLAINTIFF MANN

28. All allegations of paragraphs 1-17 above are reallege herein by reference.

29. Plaintiff SHELLY L. MANN is the defendant in the case of Randall L.

Mann v Shelly L. Mann, Washtenaw County Circuit Court Case #86-36538-DM. In the Judgment of Divorce entered on April 27, 1988, Plaintiff Mann was awarded custody of the parties' two minor children. On June 14, 1988, Randall Mann filed a post-judgment motion for custody. Following a friend of the court referee hearing and recommendation, after Plaintiff Mann's objection and requests for de novo hearing, on November 1, 1989, defendant changed custody of the children to Randall Mann without first holding a hearing as requested by Plaintiff Mann and required by law, the United States Constitution, and by the Michigan Constitution.

30. Although the defendant had no power, no right, no jurisdiction to enter an order based on a decision by a referee, not a judge, he ordered the

children turned over by noon of the same day. (November 29, 1989). Plaintiff Mann did not turn over the children. On November 30, 1989, she filed her appeal in the Court of Appeals and tried to get a correction of the clear legal error immediately. On December 1, 1989, defendant remanded Plaintiff Mann to jail until the children were turned over. Plaintiff Mann stayed in jail for ten days, could not handle it anymore, and turned over the children. When the case was heard in the Court of Appeals, they ruled that the action of the defendant was clear legal error. But it was too late, the damage had been done.

31. When the evidentiary hearing was finally held, it did not start until April 27, 1990, was continued to May 11, 1990, and concluded on May 18, 1990.

Six months passed between the granting of a hearing on November 1, 1989, and the start of the hearing in violation of the rule that custody hearing be held within the 56 days.

32. At the conclusion of the hearing the defendant, among other things, took joint custody away from Plaintiff Mann when Randall Mann had not even requested it, ordered supervised visitation (with no evidence to support), and ordered child support to be as recommended by the friend of the court. On all three points he was reversed and the case remanded.

33. In the hearing on remand, defendant did not follow the directives of the Court of Appeals order, held a hearing on issues not remanded, increased his actions that appeared to be punishing

Plaintiff Mann, and increased his harassment of her. At the conclusion of that hearing (on December 4, 1991), defendant ordered that Jack Allen, the father of her two younger children, not be present during visitation for five years, and that there shall be no smoking in her home while the two older children are present for visitation.

34. On December 11, 1991, the defendant was hearing argument for the settlement of the order from the December 4 opinion on the record. The attorney for Plaintiff Mann had obtained a transcript of the proceeding to support the fact that the proposed judgment did not conform to the judge's decision on the record. The defendant ruled to proceed paragraph by paragraph. The points being made were all supporting Plaintiff Mann, then the

defendant stated, in effect, that he had had enough and signed the order, not in conformance with the record, and without hearing the balance of the Plaintiff Mann's objections.

35. On January 8, 1992, Randall Mann filed a motion that he be permitted to move to Arkansas with the minor children and noticed it for hearing on January 29, 1992. At that time it was pointed out to the defendant that he did not have jurisdiction (to change the visitation provisions of the appealed order and grant the application to move) because the jurisdiction is in the Court of Appeals (See MCR 7.208(A) and 7.209(A). Nevertheless, he ignored the court rule and ordered the hearing to be held within one week. This evidentiary hearing date (within one week) was in marked contrast

to the several months that Shelly Mann had to wait for her custody hearing in 1990. On March 6, 1992, he commenced hearing evidence, and gave every indication that he had decided in advance to grant the move; however, after repeated objections by Plaintiff Mann's counsel that he did not have jurisdiction, he finally stopped the hearing, phoned the Court of Appeals, and advised Randall Mann and his attorney to move for a remand. Subsequently, after remand from the Court of Appeals, he granted the permission to move.

36. Defendant violated his duties to plaintiff Mann, and in the violation of such duties, infringed upon plaintiff Mann's constitutional rights as alleged hereinabove in paragraphs 8, 9, and 10 (a, b, d, and g) as follows:

a. Defendant has frequently,

and repeatedly, breached his duty to Plaintiff Mann by violating her constitutional rights, specifically by ordering that her children could not be in the presence of Jack Allen, the father of her other two children; ordering her not to smoke in her own home when the children are present; harassing her with unwarranted statements, insults, and disrespect; and invading her privacy, integrity, and family rights. He made decisions and took sides early on (before evidence is presented) to such an extent that Plaintiff Mann developed the opinion that she had always lost in advance of any hearing;

b. Defendant breached his duty, as alleged herein in paragraph 35, by setting a hearing date and commencing a hearing when he had no jurisdiction to do

so.

c. Defendant breached his duty, in his administrative capacity, as alleged herein in paragraph 31, by refusing to set a hearing date on Randall Mann's motion for change of custody, which Plaintiff Mann had asked for, within 56 days as required by MCR 3.206(F);

d. Defendant breached his duty, as alleged herein in paragraph 29, by making a decision and changing custody, which he had no jurisdiction to do. This violation is the result of a policy and practice and occurs frequently even though the defendant has been reversed on the issue at least twice by the Michigan Court of Appeals.

e. Defendant breached his duty as alleged herein in paragraphs 30, 32, 33, 34, and 35.

f. Defendant breached his duty, in all his functional capacities, by violating the constitutional rights of Plaintiff Mann, through denial of due process, equal protection, invasion of rights of privacy, and interference with and denial of the right to be represented by counsel, in all the violations of duty as alleged in this paragraph.

37. As a direct and proximate cause of the intentional and negligent acts of the defendant as alleged, his wrongful acts and policies, and the breaches of duty as stated, Plaintiff Mann has been damaged by loss of money, wrongful incarceration for 10 days at a time when she was nursing a baby, the loss from not having custody and the breakdown of the relationship with the minor children, the suffering put upon the

children, invasion of her privacy and interference with her current family relationship, caused by the defendant's illegal and unconstitutional actions, and other monetary and emotional damages caused by the violations of her constitutional and civil rights, emotional distress, mental anguish, trauma, humiliation, and harassment.

38. As a result of the gross, willful and flagrant violation of Plaintiff's constitutional rights as set out above, Plaintiff Mann is entitled to a substantial award of both compensatory and punitive damages as full compensation for those damages caused by the acts of the defendant that are not by law protected by judicial immunity.

39. The acts of defendant as alleged herein are serious, numerous, and

frequently repeated in the Mann case and are likely to continue unless declaratory and injunctive relief is granted by this Court. Plaintiff Mann requests that defendant be enjoined from continuing the illegal and unconstitutional practices to which he has subjected the Plaintiff Mann, and that the defendant be enjoined from hearing family law cases.

40. In addition Plaintiff Mann is incurring attorney fees in the prosecution of this case and requests full attorney fees as allowed by law in civil actions under Title 42 USC § 1983, as provided in Title 42 USC §1988.

WHEREFORE, Plaintiffs respectfully request that this Court grant them the following relief against Defendant:

(1) Order equitable, declaratory, and injunctive relief against Defendant,

including, but not limited to, ordering that Defendant, (i) refrain from hearing any domestic family matters; (ii) amend his policies and practices in the specific manners herein complained of to stop his infringement of constitutional rights in his court room and in the administration of the business of his court; (iii) institute internal record keeping procedures, and surveillance, to ensure compliance with these orders;

(2) Issue an order directing that Plaintiff Thorson's Motion for Change of Custody be referred to the Friend of the Court for a recommendation and the motion set for an evidentiary hearing timely and in accord with the court rules, and before a judge other than the defendant;

(3) Issue an order directing that any further proceedings in Plaintiff

Mann's case be held before a judge other than the defendant;

(4) Award damages to compensate Plaintiffs Thorson and Mann, and all plaintiffs in the class, for their actual, compensatory, damages incurred as a result of defendants' violations of their constitutional rights to the extent that such violations are not protected by judicial immunity;

(5) Award damages to fully compensate Plaintiffs Thorson and Mann, and all plaintiffs in the class, as exemplary damages for their emotional distress, mental anguish, loss of their constitutional and civil rights, humiliation and embarrassment caused by Defendants' intentional violation of their constitutional rights to the extent that such intentional violations are not

protected by judicial immunity;

(6) Grant Plaintiffs Thorson and Mann, and all plaintiffs in the class, an award of attorney's fees, costs and interest incurred in bringing this action; and

(7) Award plaintiffs Thorson and Mann and all others similarly situated such other, further, and alternative relief that the Court finds just, proper, appropriate, and equitable.

DATED: July 20, 1992

Shirley J. Burgoyne (P11409)
Attorney for Plaintiff
206 Miller,
Ann Arbor, MI 48104
(313) 665-4068

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SHELLY L. MANN and ROBERT W. THORSON, on behalf of themselves and all others similarly situated,

Plaintiff,

-vs-

PATRICK J. CONLIN,

Case No. 92CV74022DT

Defendant.

Shirley J. Burgoyne (P11409)
Attorney for Plaintiffs
206 Miller, Ann Arbor, MI 48104
(313) 665-4068

COMPLAINT OF INTERVENING PLAINTIFF

BEVERLY KISH

Intervening Plaintiff, Beverly Kish, by her attorney, Shirley J. Burgoyne, for Complaint against PATRICK J. CONLIN, states as follows:

GENERAL ALLEGATIONS

1. Intervening plaintiff

realleges all allegations of the Amended Complaint on file herein, paragraphs 1-17.

2. Intervening plaintiff BEVERLY KISH the defendant in the case of Theodore G. Apostoleris v Beverly A. Apostoleris, Washtenaw County Circuit Court Case #85-34532-DM. A Judgment of Divorce was entered on January 27, 1988. The violations of Intervening Plaintiff Kish's constitutional rights by the Defendant Conlin began on or about August 28, 1985, and are continuing to the present time.

3. On February 11, 1988, a Claim of Appeal was filed from the Judgment of Divorce entered on January 27, 1998. The filing of that Claim of Appeal vested jurisdiction in the Court of Appeals pursuant to MCR 7.204(B). Following the vesting of jurisdiction in

the Court of Appeals, the lower court does not have jurisdiction to set aside or amend the judgment or order appealed, except on order of the Court of Appeals or on stipulation of the parties pursuant to MCR 7.208(A).

4. Between February 11, 1988, and May 9, 1990, the defendant proceeded as if there was no appeal. On May 9, 1990, according to the docket entries, the Defendant ruled that he could not hear a show cause "until decision has been made by the appeals court." The proceedings between February 11, 1988, and May 9, 1990, are void for lack of jurisdiction.

5. On May 5, 1989, the Defendant entered an order suspending Beverly Kish's visitation with the minor children until a psychological evaluation is made, and the professional renders an

opinion. As of this time, Beverly Kish continues to not have visitation with her children, and the evaluation has never taken place.

6. In an order dated March 18, 1988, the Defendant ordered Beverly Kish and her ex-husband to share the cost of providing adult third party supervision on an equal basis. A dispute arose regarding the charges made by the supervising agency, Quality Care. In addition to the time for supervision, it billed the parties for preparation time for testimony and for in court time. The Defendant ignored Beverly Kish's attorney's argument that such billing was contrary to the law regarding statutory witness fees. Contrary to law, and to his own order, the Defendant in an order dated October 24, 1990, ordered Beverly Kish to pay the

disputed amount ($409.00) to Quality Care.

7. On April 17, 1992, Defendant stated in open court that he would grant an evidentiary hearing but that it would not matter because, "I always accept the recommendation of the Friend of the Court;" thereby, denying Beverly Kish's right to a de novo hearing.

8. While the case was on appeal in the Court of Appeals, the defendant ordered child support to be paid by Beverly Kish to the ex-husband and ignored laws with regard to imputation of income. Show causes continue to this date, supported by the court, to enforce payment of child support by a mother at home caring for her two children from a second marriage who are both under 3 years of age.

9. In addition, Defendant has

violated law and court rules regarding the payment of attorney fees by Beverly Kish who has no job and no funds of her own, applied rules inconsistently in the conduct of the trial of the case to favor Beverly' ex-husband as against Beverly, showing extreme disregard for the severe effect that his conduct has upon litigants and others appearing before him as a judge. This behavior by the defendant in the Apostoleris case is consistent with his repeated violations of due care as alleged in Paragraph 11 (a) of the Amended Complaint, causing considerable damage to the mother-child relationship, and to the children themselves.

10. Defendant violated his duties to the intervening plaintiff Kish, and in the violation of such duties, infringed upon the plaintiff Kish's

constitutional rights as alleged hereinabove in paragraphs 8, 9, and 10 (a, b, e, f, and g) as follows:

a. Defendant breached his duty, in his judicial, adjudicative, capacity to deliberate, weigh evidence, and decide fairly. Defendant violated both the due process and equal protection clauses by the facts as hereinafter alleged, by repeated improper acts during the trial and hearings and by not giving Beverly Kish equal treatment in his decisions and by taking sides early on, and then deciding everything in accord with that preliminary opinion, and not based on the actual evidence;

b. Defendant breached his duty, in his administrative capacity, and violated court rules and statutes, by requiring Intervening Plaintiff Kish to

pay $409 to Quality care;

c. Defendant breached his duty, in his administrative capacity, by holding hearings (having decided in advance to follow the friend of the court recommendation contrary to law); thereby, in effect, denying any hearing to Beverly Kish; therefore, the due process clause of the constitution was violated;

d. Defendant breached his duties to follow the court rules when he ordered Intervening Plaintiff Kish to pay full attorney fees for her ex-husband without first determining in an evidentiary hearing that she had the ability to pay and whether the other party needed the fees paid. [In compliance with the standards of MCR 3.206(A) and other applicable court rules.] Defendant repeated this breach of duty several times

as to Intervening Plaintiff Kish.

e. Defendant breached his duty, in all his functional capacities, by violating the constitutional rights of Plaintiff Thorson in all the violations of duty as alleged in this paragraph.

11. As a direct and proximate cause of the intentional and negligent acts of the defendant as alleged, his wrongful acts and policies, and the breaches of duty as stated, Intervening Plaintiff Kish has been damaged by a loss of the money that she paid to attempt to obtain her rights, a loss (increasing daily) from not having visitation with her minor children causing suffering upon the children as well as the Intervening Plaintiff, invasion of her privacy and interference with her current family relationship, has suffered monetary and

emotional damages caused by the violations of his constitutional and civil rights, emotional distress, psychological damages, mental anguish, trauma, humiliation, and other compensatory and exemplary damages.

12. As a result of the gross, willful and flagrant violation of Plaintiffs' constitutional rights as set out above, Plaintiff Kish is entitled to a substantial award of both compensatory and punitive damages as full compensation for those damages caused by the acts of the defendant that are not by law protected by judicial immunity.

13. The acts of defendant as alleged herein are serious, numerous, and frequently repeated in the Kish case, will not continue in the Kish case as Defendant has now disqualified himself; however, the violations are likely to continue, as to

the numerous other litigants subjected to the Defendant's illegal and unconstitutional acts, unless declaratory and injunctive relief is granted by this Court. Intervening Plaintiff Kish requests that defendant be enjoined from continuing the illegal and unconstitutional practices to which he has subjected the Plaintiff Kish, and numerous other litigants, and that the defendant be enjoined from hearing family law cases.

14. In addition Plaintiff Kish is incurring attorney fees in the prosecution of this case and requests full attorney fees as allowed by law in civil actions under Title 42 USC § 1983, as provided in Title 42 USC §1988.

WHEREFORE, Plaintiffs respectfully request that this Court grant them the following relief against Defendant:

(1) Order equitable, declaratory, and injunctive relief against Defendant, including, but not limited to, ordering that Defendant, (i) refrain from hearing any domestic family matters; (ii) amend his policies and practices in the specific manners herein complained of to stop his infringement of constitutional rights in his court room and in the administration of the business of his court; (iii) institute internal record keeping procedures, and surveillance, to ensure compliance with these orders;

(2) Award damages to compensate Intervening Plaintiff Kish, and all plaintiffs in the class, for their actual, compensatory, damages incurred as a result of defendants' violations of their constitutional rights to the extent that such violations are not protected by

judicial immunity;

(3) Award damages to fully compensate Intervening Plaintiff Kish, and all plaintiffs in the class, as exemplary damages for their emotional distress, mental anguish, loss of their constitutional and civil rights, humiliation and embarrassment caused by Defendants' intentional violation of their constitutional rights to the extent that such intentional violations are not protected by judicial immunity;

(4) Grant Intervening Plaintiff Kish, and all plaintiffs in the class, an award of attorney's fees, costs and interest incurred in bringing this action; and

(5) Award Intervening Plaintiff Kish and all others similarly situated such other, further, and alternative relief

that the Court finds just, proper, appropriate, and equitable.

DATED: November 17, 1992

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APPENDIX D

MANN v MANN

Docket Nos. 123650, 130009. Submitted February 6, 1991, at Lansing. Decided August 5, 1991, at 9:40 A.M.

Randall L. Mann and Shelly L. Mann were granted a judgment of divorce in the Washtenaw Circuit Court in which Shelly was granted sole physical custody of their two minor children and both were awarded joint legal custody. Randall thereafter moved for, and a Friend of the Court referee recommended, a change in custody. Shelly objected and requested a hearing de novo in the circuit court. Before the hearing, the court, Patrick J. Conlin, J., entered an interim order changing physical custody to Randall solely on the basis of the referee's recommendation. Shelly thereafter was found in contempt for failing to turn the children over to Randall. Following a hearing de novo, the court entered a final order that granted Randall sole legal and physical custody, permitted Shelly only supervised visitation, and adopted the Friend of the Court recommendation regarding child support. Shelly appeals both that final order and the order finding her in contempt of court. The appeals were consolidated by the Court of Appeals.

The Court of Appeals *held:*

1. The court erred when it temporarily changed custody solely on the basis of the Friend of the Court recommendation and without conducting a hearing. A court may enter an interim order changing custody only after conducting a hearing, and a Friend of the Court report and recommendation is not admissible evidence at the hearing unless the parties so stipulate. However, reversal of the final order changing custody is not required, because a hearing de novo eventually was held.

2. The defendant's violation of the interim order was properly treated as contempt of court. An order entered by a court with proper jurisdiction must be obeyed, even if the order is incorrect.

3. The court may have violated MCR 3.206(F)(1) by not conducting the hearing de novo within the prescribed time period, but no violation of due process resulted.

4. A trial court is not required to find a change of circumstances before changing custody. The court, in the best inter-

ests of the children, may change custody either for proper cause shown or because of a change of circumstances.

5. The court's finding that the plaintiff proved by a preponderance of the evidence that it was in the best interests of the children to change physical custody was not against the great weight of the evidence, a palpable abuse of discretion, or clear legal error.

6. The court erred in awarding sole legal custody to the plaintiff, who had requested continuation of joint legal custody, without giving the defendant notice and an opportunity to be heard. That part of the court's order must be reversed.

7. The court erred in delegating to the Friend of the Court the child support determination, requring a remand for the trial court's determination of the defendant's child support obligation.

8. The court did not sufficiently consider the issue of supervised visitation. Remand is necessary to permit the court to make findings of fact with regard to the order for supervised visitation.

Affirmed in part, reversed in part, and remanded.

Joseph H. Dillon, for the plaintiff.

Shirley J. Burgoyne and *Janice C. Tice,* for the defendant.

Before: DANHOF, C.J., and HOLBROOK, JR., and SULLIVAN, JJ.

SULLIVAN, J. In this consolidated appeal, defendant challenges two orders entered by the Washtenaw Circuit Court: (1) a final order changing physical and legal custody of the parties' minor children to the plaintiff (Docket No. 130009), and (2) another order finding defendant in contempt of court for her failure to turn over the parties' children to plaintiff when required by court order (Docket No. 123650). We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Under the April 27, 1988, judgment of divorce, defendant received sole physical custody of the

parties' two minor sons and the parties were awarded joint legal custody. Defendant retained sole physical custody from June 1988 until November 1989, when the circuit court entered an interim order changing the physical custody of the children from defendant to plaintiff solely on the basis of a Friend of the Court referee's recommendation, and pending a hearing de novo. The hearing de novo eventually was held in April and May 1990, following which the court entered a final order granting sole legal and physical custody to plaintiff.

Precipitating the November 1989 "interim" change in custody was plaintiff's motion to change custody. In his motion, plaintiff alleged that defendant had an unrelated male living in the home with her and the children, that she was pregnant without being married, that "illegal activities" were being conducted in defendant's home in the presence of the children, and that the children's school performance had deteriorated since they had been in defendant's custody. Before recommending a change in custody, the Friend of the Court referee considered evidence taken at an evidentiary hearing and a psychological evaluation done on the parties, their mates, and their children.

Defendant objected to the Friend of the Court report and recommendation, MCL 552.507(5); MSA 25.176(7)(5), and requested a hearing de novo in circuit court. At a subsequent hearing, on November 1, 1989, the court explained that defendant, of course, was entitled to a hearing de novo. Moreover, at that time, the court adopted the Friend of the Court recommendation and, accordingly, changed physical custody of the children. However, the court did not refer to it as a change in custody. Instead, the court referred to it as a

"temporary change in possession." The court further explained that it was the court's practice under these circumstances to adopt and implement the recommendation until the hearing de novo could be held.[1]

Finally, in April and May 1990, the court held a hearing de novo with regard to plaintiff's motion for a change of custody. Following the hearing, the court granted plaintiff sole legal and physical custody of the children, granted defendant only supervised visitation, and adopted the Friend of the Court recommendation regarding child support.

Defendant now appeals as of right, raising several issues. We first address defendant's arguments regarding the interim change of custody. Defendant first argues that the trial court committed a clear legal error and deprived her of due process of law by changing custody, even temporarily, because the trial court (1) did not first hold an evidentiary hearing, (2) did not make a finding of a compelling circumstance necessitating the change, and (3) merely adopted the Friend of the Court recommendation. Where a party objects to a Friend of the Court recommendation regarding a change in custody, a court cannot permanently change custody without first holding a hearing de novo. *Crampton v Crampton*, 178 Mich App 362, 363; 443 NW2d 419 (1989). Nor can a court permanently change custody on the basis of a Friend of the Court report unless the parties agree that the court can consider the report as evidence. *Stringer v Vincent*, 161 Mich App 429, 433; 411 NW2d 474 (1987). Therefore, the question is whether the trial court may do by a postjudgment interim order temporarily changing custody that which it cannot

[1] Defendant's attorney strongly questioned the court's practice of changing custody without first holding a hearing and making the appropriate findings.

do by a final order changing custody. We hold that it cannot.

In this case, at the hearing during which the court temporarily changed custody of the children pending a hearing de novo, the court acknowledged that it did not "know much about this case." Nevertheless, the court ruled that the Friend of the Court recommendation would stand or become the order until the court could conduct a hearing de novo. The court continued: "There will be a temporary change in possession and custody until I have an opportunity—you see, I can't tell when I'm going to get this hearing done. I only have the ability to do whatever I can. And you go out and get your hearing. Until there's a hearing the recommendations of the Friend of the Court are granted. If it means a temporary change in possession and custody, then so be it." The court thereafter entered an order entitled "Interim Order Modifying Judgment of Divorce In re Custody and Support of Minor Children and De Novo Hearing," which awarded plaintiff primary physical custody of the children.

We conclude that the trial court committed a clear legal error by temporarily changing custody solely on the basis of the Friend of the Court recommendation and without holding a hearing.

Section 7(1) of the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.*, outlines the actions a court may take in a child custody dispute. Section 7(1)(c) provides that for the best interests of the child, a trial court may

> [m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age, and, subject to section 4a, until the child reaches 19 years and 6 months of age. The court

> shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. [MCL 722.27(1)(c); MSA 25.312(7)(1)(c).]

If no custodial environment exists, the trial court may modify a custody order if the petitioning party can convince the court by a preponderance of the evidence that it should grant a custody change. *Stringer, supra,* p 435.

A trial court's characterization of its change in physical custody or possession as temporary or interim, pending a final judgment, does not change the fact that the court is changing physical custody of the child. Nor does its characterization of its order as interim change the fact that it is modifying a previous divorce judgment. Therefore, § 7(1)(c) of the Child Custody Act seems to apply. However, even if § 7(1)(c) does not apply, § 7(1)(f) gives a court authority to grant an interim order changing custody: For the best interests of the child, the court may "[t]ake any other action considered to be necessary in a particular child custody dispute." Under either subsection, though, where a party objects to a Friend of the Court recommendation, a court should not be permitted to temporarily change custody without first holding a hearing.

In adopting § 7(1)(c), the Legislature intended to "minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an 'established custodial environment,' except in the most compelling cases." *Baker v Baker,* 411 Mich 567, 576-577; 309 NW2d 532 (1981). Permitting a court to even temporarily change custody solely on the basis of a Friend of the Court referee's recommen-

dation and without holding a hearing would circumvent and frustrate one of the purposes of the Child Custody Act—to minimize the prospect of unwarranted and disruptive changes of custody.

Moreover, we conclude that in determining whether a temporary change is appropriate or necessary, a hearing must be conducted. Without considering admissible evidence—live testimony, affidavits, documents, or other admissible evidence—a court cannot properly make the determination or make the findings of fact necessary to support its action under § 7(1) of the Child Custody Act. Unless the parties stipulate, a Friend of the Court report and recommendation are not evidence. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989).

Another panel of this Court considered a similar issue in *Pluta v Pluta*, 165 Mich App 55; 418 NW2d 400 (1987). The plaintiff in *Pluta* was granted permanent physical custody of the parties' minor son in a 1983 judgment of divorce. The plaintiff had custody of their son from the time they separated in 1980 until March 1985, when she left the state. The parties agreed that the defendant was to care for the child until the plaintiff returned to Michigan so that the child would not be uprooted and have to change schools during the school year. While the defendant had custody of the child pursuant to the parties' arrangement, he successfully moved the trial court for an ex parte order granting him temporary custody. The court denied the plaintiff's subsequent motion to set aside the order. The court ultimately granted permanent custody to the defendant.

On appeal, this Court held that it was clear legal error for the trial court to enter an ex parte order temporarily changing the custody of the

child. Relying on § 7(1)(c) of the Child Custody Act, this Court reasoned that the trial court could not change custody without notice to the custodial parent or a hearing with regard to the issue whether clear and convincing evidence was presented that a change of custody was in the child's best interests. *Pluta, supra,* pp 59-60.

We recognize that situations might arise in which an immediate change of custody is necessary or compelled for the best interests of the child pending a hearing with regard to a motion for a permanent change of custody. See *Ruppel v Lesner,* 127 Mich App 567; 339 NW2d 49 (1983), rev'd on other grounds 421 Mich 559; 364 NW2d 665 (1984), and cf. *Pluta, supra.* Such a determination, however, can only be made after the court has considered facts established by admissible evidence —whether by affidavits, live testimony, documents, or otherwise.[3] In this regard, we note that circuit court custody disputes and actions "shall have precedence for hearing and assignment for trial over other civil actions." MCL 722.26; MSA 25.312(6).

Our conclusion that the trial court committed clear legal error does not, however, compel us to reverse the court's final order changing custody, because a hearing de novo was eventually held.

Defendant also argues that the court's finding that she was in contempt for failing to deliver the children to plaintiff should be "purged." Several weeks after the court entered the interim order temporarily changing custody to plaintiff, defendant refused to deliver the children to plaintiff following visitation. The court ordered that defen-

[3] The transcript of the hearing during which the trial court granted temporary custody to plaintiff reveals that even plaintiff's attorney was surprised that the court was granting temporary custody at that point.

dant be held in contempt of court and jailed until she delivered the children to plaintiff. The court rejected defendant's request for a stay because its order was only temporary.[3] Defendant was jailed and remained so for several days until she agreed to deliver the children to plaintiff.

Defendant now reasons that because the interim order temporarily changing custody was erroneously entered, she could not be held in contempt for having violated it. We disagree. An order entered by a court with proper jurisdiction must be obeyed even if the order is incorrect. Therefore, violation of an order may be treated as contempt. See *In re Hague*, 412 Mich 532, 544-545; 315 NW2d 524 (1982), and *State Bar of Michigan v Cramer*, 399 Mich 116, 125; 249 NW2d 1 (1976).

Defendant further argues that the trial court's failure to hold the hearing de novo in a timely manner violated the pertinent court rule and deprived her of due process of law. MCR 3.206(F)(1) provides that "[w]hen the custody of a minor child is contested, a hearing on the custody issue must be held within 56 days after the court so directs or after the filing of notice that a custody hearing is requested." This time period may be extended for good cause. MCR 3.206(F)(3).

In this case, the hearing de novo was not held until about six months after defendant requested such a hearing. In response, we note that the Child Custody Act favors the prompt resolution of child custody disputes. See, e.g., § 6. Toward that

[3] Defendant initially filed a claim of appeal as of right from the interim order changing custody. By order entered December 12, 1989 (Docket No. 123650), this Court dismissed the appeal for lack of jurisdiction and denied the motion for enforcement of an automatic stay because the order was only temporary or interim. CYNAR, P.J., and MICHAEL J. KELLY and DOCTOROFF, JJ. Defendant's subsequent application for leave to appeal was denied on April 3, 1990 (Docket No. 124402). SHEPHERD, P.J., and CYNAR and CAVANAGH, JJ.

end, child custody disputes take precedence for hearing over other civil actions. However, even if the trial court violated the court rule by not conducting the hearing within the prescribed time period, we decline to reverse the final order changing custody on the basis of the violation. In the absence of a court rule providing a sanction for such a violation, we decline to impose one. See, e.g., *In re Kirkwood*, 187 Mich App 542; 468 NW2d 280 (1991). Nor did the violation, if any, deprive defendant of due process. *Id.*

We now turn to defendant's argument regarding the permanent change in custody. Although our review of this custody case is de novo, *Baker, supra*, p 573, we must affirm the trial court's custody decision unless it "made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; MSA 25.312(8).

Defendant argues that the trial court committed clear legal error by failing to state before or after the hearing who had the burden of proof and that the petitioning party was required to show a change in circumstances. This argument is without merit. Case law clearly indicates that the party petitioning for a change of custody always has the burden of proof. *Wilson v Gauck*, 167 Mich App 90, 95; 421 NW2d 582 (1988); *Stringer, supra*, pp 434-435. In its written opinion, the trial court correctly stated that because no custodial environment existed, the burden of proof was on plaintiff as the petitioning party.[4] Moreover, absent a request from the parties, nothing requires a trial

[4] Within her argument, defendant states, without argument or citation to supporting authority, that "[t]here was an established custodial environment in the defendant-mother." Having reviewed the record, we conclude that the court's preliminary and final finding of no established custodial environment was neither clear legal error nor against the great weight of the evidence.

court to explicitly state, in advance, which party has the burden of proof. Finally, the trial court is not required to find a change of circumstances before changing custody. The Child Custody Act provides that for the best interests of the children, the court may change custody for "proper cause shown or because of change of circumstances." Section 7(1)(c).

Defendant also argues that the trial court's findings of fact with respect to the best interest factors were against the great weight of the evidence. A trial court must consider, evaluate, and determine each of the factors contained in § 3 of the Child Custody Act, MCL 722.23; MSA 25.312(3), in determining the best interests of the children. *Truitt v Truitt*, 172 Mich App 38,47; 431 NW2d 454 (1988).

Defendant's primary challenge to the lower court's findings concerns the court's reliance on the allegedly unsubstantiated and discredited testimony of expert witness Dr. Marcella Thall, a psychologist. Both parties agreed to submit to a custody evaluation conducted by Dr. Thall, which ultimately resulted in the doctor's recommending that plaintiff be awarded custody of the children. The court's findings with respect to the § 3 best interest factors (b), (e), and (k) were based in part on Dr. Thall's opinion that defendant had an addictive personality, gave affection on a self-need basis, and had a desire for "pleasurable experiences" even if they are detrimental.

Defendant contests the weight the court gave to the testimony, not the admissibility of the testimony. However, defendant failed to cite any authority supporting her challenges to the expert's opinion testimony. The statement of a position without citation of authority to support the position is insufficient to bring an issue before this

Court. A party may not leave it to this Court to search for authority to sustain or reject a position. *Consumers Power Co v Public Service Comm*, 181 Mich App 261, 268; 448 NW2d 806 (1989). Moreover, even disregarding the court's reliance on the expert's opinion, the court's findings regarding factors (b), (e), and (k) were not against the great weight of the evidence.

Defendant also appears to challenge the trial court's findings regarding factors (c), (f), and (j). Having carefully reviewed the record, we find that the court's finding with respect to factor (c) was not against the great weight of the evidence.

The court's findings regarding the other two factors, however, do trouble us. The court's finding that factor (f)—the moral fitness of the parties—favors plaintiff seems to have been based on defendant's having had a baby with a teen-aged man to whom she was not married. We question whether, standing alone, this was enough to constitute immorality under the Child Custody Act.

The court's finding regarding factor (j)—the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent—appears to have been based on defendant's previous failure to deliver the children to plaintiff, resulting in her being held in contempt. However, in light of all the evidence presented, including defendant's reasons for failing to deliver the children, we conclude that this finding was against the great weight of the evidence. At most, however, the evidence showed that the parties were equal with respect to factors (f) and (j).

Even if the trial court made findings against the great weight of the evidence with respect to factors (f) and (j), we decline to reverse the change of custody. In light of the factors that favored plain-

tiff, and the equality of the parties with respect to the remaining factors, we conclude that the trial court's ultimate finding that plaintiff proved by a preponderance of the evidence that it was in the best interests of the children to change physical custody was not against the great weight of the evidence, a palpable abuse of discretion, or a clear legal error.

Defendant raises some issues that have merit and require a remedy. Defendant argues that the trial court committed clear legal error by awarding sole legal custody to plaintiff when he never requested it. We agree. The parties' judgment of divorce provided that they would have joint legal custody of the children. In his motion for a change of physical custody, plaintiff did not request a change of legal custody. In fact, in his supporting brief, plaintiff specifically requested the court to continue joint legal custody. The court nevertheless granted plaintiff sole legal custody, without notice to the parties and without even stating its reasons for doing so.

The court committed a clear legal error. Although the court had the authority to change legal custody, see § 7(1) of the Child Custody Act, we do not believe that it could do so without giving defendant notice and an opportunity to be heard. See, e.g., *Lyons v Lyons*, 125 Mich App 626, 630, n 5; 336 NW2d 844 (1983). The court in effect deprived defendant of the opportunity to be heard. Had defendant had notice that the court was considering awarding sole legal custody to plaintiff, she might have presented further proofs or made different tactical decisions. See, e.g., *Wilson, supra*. That part of the trial court's decision awarding sole legal custody to plaintiff is therefore reversed.

The trial court also committed clear legal error

in delegating to the Friend of the Court the child support determination. The record in this case shows that the court did not make its own independent determination with regard to child support payments, but, instead, relied solely on the Friend of the Court recommendation. See *Hoke v Hoke*, 162 Mich App 201, 206-207; 412 NW2d 694 (1987), and *Cochran v Buffone*, 137 Mich App 761, 766-767; 359 NW2d 557 (1984). This matter is therefore remanded for the trial court to determine defendant's child support obligation.

Defendant also argues that in ordering supervised visitation, the court made findings not supported by the evidence. Our reading of both the trial court's bench and written opinions indicates that the court did not sufficiently consider this issue under §§ 7 and 7a of the Child Custody Act. We therefore direct the court on remand to make the necessary findings of fact in this regard.

Defendant's remaining issues clearly are without merit and do not require discussion.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

(3)

Supreme Court, U.S.
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No. 94-101

In The

Supreme Court of the United States

October Term, 1994

SHELLY L. MANN; ROBERT W. THORSON, individually and as representatives of the class, and BEVERLY KISH,

Petitioners,

vs.

PATRICK J. CONLIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. WHETHER THE CORRECT STANDARD WAS USED IN DISMISSING PETITIONERS' DAMAGE CLAIMS AND WHETHER THIS DECISION IS IN CONFLICT WITH *CONLEY* v. *GIBSON*, 78 S. Ct. 99 (1957).

B. WHETHER THE DOCTRINE OF JUDICIAL IMMUNITY JUSTIFIED THE DISMISSAL OF PETITIONERS' COMPLAINT AND WHETHER THIS DECISION IS IN CONFLICT WITH OTHER CIRCUITS.

C. WHETHER THE YOUNGER DOCTRINE REQUIRED THE LOWER COURT TO ABSTAIN FROM GRANTING PETITIONERS' PROSPECTIVE INJUNCTIVE RELIEF AND WHETHER THIS DECISION IS IN CONFLICT WITH OTHER CIRCUITS.

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A. THE CORRECT STANDARD WAS USED TO PROPERLY DISMISS PETITIONERS' DAMAGE CLAIMS FOR FAILURE TO STATE A CLAIM AND IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR ANY CIRCUIT 8

B. PETITIONERS' CLAIMS FOR DAMAGES WERE PROPERLY DISMISSED AS THERE WERE NO FACTUAL ALLEGATIONS WHICH WOULD DEFEAT JUDICIAL IMMUNITY. THIS DECISION DOES NOT CONFLICT WITH ANY OTHER CIRCUIT 10

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' REQUEST FOR WRIT OF CERTIORARI

OPINIONS BELOW

Respondent-Appellee relies upon Petitioner-Appellant's statement.

JURISDICTION

Respondent-Appellee relies upon Petitioner-Appellant's statement.

STATEMENT OF THE CASE

Petitioner-Appellants, Robert W. Thorson ("Thorson"), Shelly L. Mann ("Mann"), and Beverly Kish ("Kish"), (collectively referred to as Petitioners), are individual litigants in **domestic relations actions** which had been pending before Respondent, Judge Patrick J. Conlin, in Washtenaw County Circuit Court. After the commencement of this action, each of their cases was transferred to another trial judge. Petitioners are **not** representatives of a class. Certification as a class under Fed. R. Civ. P. 23 has never been granted. Thorson's and Mann's complaint alleges a variety of violations and improprieties by Judge Conlin (Appendix B). Proposed intervening Petitioner, Kish, cites additional wrongdoing by the Judge (Appendix C). All three believe that Judge Conlin violated their constitutional rights and are suing

for money damages as well as prospective injunctive relief and attorneys fees.

The facts in the three underlying cases, as alleged in the complaint and proposed intervenor's complaint, have been well documented and are set forth in Appendix B and C and in the briefs filed below. In the case of *Mary Jo Thorson* v. *Robert W. Thorson*, Case No. 87-38000-DM (MI. Cir. Ct. filed Nov. 24, 1987), Thorson essentially claims that the judge placed conditions (payment of the wife's attorney fees) on his right to participate in or obtain adjournments of various domestic relations hearings. (Appendix B: pp. 27a-31a, ¶19-22.)[1]

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[1] On September 7, 1988, the issue of whether the wording of the proposed judgment conformed to the record made on May 27, 1988 was before Judge Conlin. Thorson alleges that the judge ordered him to pay Five Hundred ($500.00) Dollars to his wife's attorney by noon that day if he wanted to proceed with the hearing. Since Thorson could not obtain the money, according to Thorson, the order which was entered did not conform to the record made on May 27, 1988. (Appendix B: pp. 27a-28a, ¶19.) (Thorson does not allege that he appealed the judgment and, in fact, no appeal was filed.) On December 14, 1988, a dispute arose regarding visitation. Thorson alleges that Judge Conlin ordered that a Friend of the Court referee hearing would be held only if Thorson paid a retainer of Five Hundred ($500.00) Dollars to his ex-wife's attorney, paid all of her attorney fees at One Hundred Twenty Five ($125.00) Dollars per hour, and agreed to be bound by the Friend of the Court recommendation. (Appendix B: p. 29a, ¶20.) (There are no allegations that the order, entered May 17, 1989, was appealed and, in fact, no appeal was filed.) Thorson requested an adjournment of the hearing held on May 18, 1990 because he was ill. According to Thorson, Judge Conlin stated that he would adjourn the hearing only if Thorson paid One Hundred Thirty Five ($135.00) Dollars to his ex-wife for the amount she claimed to be losing in wages for the day.

Appellant Mann makes allegations against Judge Conlin which relate to the case of *Randall L. Mann* v. *Shelly L. Mann*, Case No. 86-36538-DM (MI. Cir. Ct. filed Dec. 12, 1986). Mann alleged that the judge made erroneous rulings of law and procedure regarding child custody issues and that hearings were scheduled in violation of the court rules and/or while the issues were being considered by the Michigan Court of Appeals. She also claimed that Conlin failed to follow the directives of the Michigan Court of Appeals regarding visitation issues. (Appendix B: pp. 37a-43a, ¶29-35.)[2]

Since he could not pay the money, he proceeded with the hearing while ill. (Appendix B: pp. 29a-30a, ¶21.) However, Judge Conlin's denial of Thorson's motion to adjourn was affirmed by the Michigan Court of Appeals in *Thorson* v. *Thorson*, unpublished opinion per curiam of the Court of Appeals, (Docket No. 133933), stating "[a]fter the motion was denied, Defendant [Thorson] proceeded to testify at length, and our review of his testimony reveals no impairment that may have prejudiced his case." Thorson's remaining allegations concern an order dated July 13, 1992 involving a custody motion. According to Thorson, Judge Conlin refused to set a date for an evidentiary hearing on the custody motion until Thorson paid his ex-wife's attorney fees in the amount of One Thousand Five Hundred Thirty Five ($1,535.00) Dollars, **as previously ordered** and until the appeal of an order dated June 20, 1990 was resolved. (Appendix B: pp. 30a-31a, ¶22.) Note that on August 31, 1992, Judge Kurtis T. Wilder of Washtenaw County Circuit Court also denied Thorson's request to have the custody issue referred to the Friend of the Court because it is inextricably woven with the appeal of the June 20, 1990 order.

[2] Mann first alleges that the judge changed custody of the children to her ex-husband based on a Friend of the Court recommendation, over her objections and without holding a de novo hearing as required by law. (Appendix B: pp. 37a-38a, ¶29.) According to Mann, Judge Conlin ordered that the

The third appellant is the proposed intervenor, Kish. Her proposed complaint refers to various actions

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children be turned over by noon that day, November 29, 1989. Mann did not turn over the children and filed a claim of appeal the next day. (Appendix B: p. 38a-39a, ¶30.) However, the Michigan Court of Appeals, in Docket No. 123650, determined that Mann had no right of appeal because the order changing custody was an interim or temporary order, not a final order. Accordingly, the court dismissed the appeal for lack of jurisdiction. Mann then filed an application for leave to appeal which was denied by the Michigan Court of Appeals in Docket No. 124402. See *Mann* v. *Mann*, 473 N.W.2d 702 (1991). (Appendix D.) On December 1, 1989, Judge Conlin ordered that Mann be remanded to jail until the children were turned over to her ex-husband as previously ordered. Mann was jailed for ten days until she capitulated, turned over the children, and was released. Mann alleges that the Court of Appeals ruled that the judge's actions were clear legal error. (Appendix B: pp. 38a-39a, ¶30.) But see *Mann* v. *Mann*, 476 N.W.2d 439 (1991), (the Court of Appeals held that Mann was properly held in contempt for violating the interim custody order). (Appendix D.) When an evidentiary hearing was finally held in the *Mann* case, six months had passed since the hearing was requested by Mann, in violation of a court rule requiring hearings within fifty six days. (Appendix B: pp. 39a-40a, ¶31.) At the conclusion of the hearing, according to Mann, Judge Conlin "took joint custody away from Plaintiff Mann when Randall Mann had not even requested it, ordered supervised visitation (with no evidence to support), and ordered child support to be recommended by the friend of the court. On all three points he was reversed and remanded." (Appendix B: p. 40a, ¶32.) In the hearing on remand from the Court of Appeals, Mann alleges that Judge Conlin did not follow the directives of the Court of Appeals. According to Mann, the judge ordered that the father of Mann's two younger children not be present during visitation for five years and that there be no smoking in the home while the two older children are visiting. (Appendix B: pp. 40a-41a, ¶33.) At a hearing regarding entry of the order, Mann claims that the judge entered

allegedly taken by Judge Conlin in the case of *Theodore G. Apostoleris* v. *Beverly A. Apostoleris*, Case No. 85-34532-DM (MI. Cir. Ct. filed Aug. 28, 1985). Kish asserts that the judge made domestic relations rulings while the judgment of divorce remained on appeal. According to Kish, Judge Conlin allegedly entered erroneous orders regarding costs in violation of his own previous orders. He allegedly made errors of law regarding child support issues and the payment of attorney fees. Kish claims that Judge Conlin improperly denied her an evidentiary hearing and otherwise showed favoritism towards her ex-husband.[3]

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an order which did not conform to the earlier record, over Mann's objections and without hearing some of her objections to the proposed order. (Appendix B: pp. 41a-42a, ¶34.) On January 8, 1992, Mann's ex-husband filed a motion requesting to move to Arkansas with the minor children. It was scheduled for a hearing even though Mann pointed out to the judge that jurisdiction of the visitation provisions of the court's order was in the Court of Appeals. An evidentiary hearing was convened in which, Mann alleges, she repeatedly objected on the ground of jurisdiction. Judge Conlin finally "stopped the hearing, phoned the Court of Appeals, and advised Randall Mann and his attorney to move for a remand. Subsequently, after remand from the Court of Appeals, he granted the permission to move." (Appendix B: pp. 42a-43a, ¶35.)

[3] Kish alleges that she filed a claim of appeal from the judgment of divorce entered on February 11, 1988. (Appendix C: Proposed complaint of Intervening Plaintiff, Beverly Kish, pp. 53a-54a, ¶3.) (The Court of Appeals affirmed the judgment of divorce in *Apostoleris* v. *Apostoleris*, unpublished opinion per curiam of the Court of Appeals, decided August 8, 1990 (Docket No. 106565).) Due to the appeal, according to Kish, Judge Conlin had no jurisdiction to act, yet he "proceeded as if there was no appeal" between February 11, 1988 and May 9, 1990. (Appendix

Respondent, Judge Conlin, filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Honorable Barbara K. Hackett of the U.S. District Court for the Eastern District, Southern Division, granted Respondent's Motion. The court found that Judge Conlin was protected by judicial immunity as the actions alleged were performed in his judicial capacity. Additionally, the court determined that

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C: p. 54a, ¶4.) Kish alleges that Judge Conlin entered an order dated May 5, 1989 suspending her visitation with the minor children until a psychological evaluation is made. The evaluation was never done and Kish is not allowed to visit her children. (Appendix C: pp. 54a-55a, ¶5.) (Kish does not allege that this order was appealed and, in fact, none was taken.) On October 24, 1990, Judge Conlin entered an order requiring Kish to pay Four Hundred Nine ($409.00) Dollars to Quality Care (the agency providing adult third-party supervision to the parties) for time spent in preparation of, and giving, testimony in court. Kish alleges this order was in violation of his earlier order, dated March 18, 1988, that the parties share the expense of Quality Care equally, and in violation of the law. (Appendix C: p. 55a, ¶6.) (There are no allegations that an appeal was taken from this order and, in fact, it was not appealed.) Kish alleges she was denied a de novo evidentiary hearing because the judge stated that he would grant the hearing but that it would not matter because he "always accepts the recommendation of the Friend of the Court." (Appendix C: p. 56a, ¶7.) Kish further alleges that Judge Conlin ignored the law with regard to imputation of income and ordered Kish to pay child support to her ex-husband, while the case was on appeal. (Appendix C: p. 56a, ¶8.) Finally, Kish alleges that Judge Conlin has violated the law and court rules regarding payment of her ex-husband's attorney fees and by showing favoritism toward her ex-husband. (Appendix C: pp. 56a-57a, ¶9.) (An appeal from an order regarding payment of attorney fees is currently pending in the Michigan Court of Appeals, Docket No. 147722.)

the *Younger* doctrine prevented the consideration of Petitioners' claims for prospective injunctive relief.

The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision. *Mann* v *Conlin*, 22 F.3d 100 (6th Cir. 1994). The court affirmed that although the district court did not cite the test enunciated in *Conley* v. *Gibson*, 355 U.S. 41 (1957), it is clear that the district court found that there was no set of facts that would allow these Plaintiffs to recover against Judge Conlin. The court also affirmed that Judge Conlin was acting in his judicial capacity and was therefore entitled to immunity for each of the allegedly "administrative" acts. Additionally, the court confirmed that *Younger* v. *Harris*, 401 U.S. 37 (1971), mandated abstention from hearing Petitioners' claims for injunctive and declaratory relief.

SUMMARY OF ARGUMENT

The court of appeals used the proper standard in affirming the granting of Respondent's Fed. R. Civ. P. 12(b)(6) motion. Citing *Conley*, 355 U.S. 41, the court of appeals found that it was clear that there are no set of facts which would permit these plaintiffs' to recover against Judge Conlin.

The court of appeals properly determined that judicial immunity barred Petitioners' claims for damages. First, each action alleged to be improper was judicial in nature. Second, none of Judge Conlin's actions was taken in the clear absence of all jurisdiction.

The court of appeals properly abstained from considering Petitioners' claims for prospective injunctive relief. Petitioners' request for prospective injunctive relief would require the federal judiciary to enjoin a state judicial proceeding implicating vital state interests. The state courts provided Petitioners with an adequate opportunity to challenge Judge Conlin's decisions by appealing his rulings to the state court of appeals. However, Petitioners repeatedly failed to avail themselves of this remedy and instead are attempting to convince the federal judiciary to reverse Judge Conlin's domestic relations decisions.

Additionally, Petitioners' allegation that the court of appeals decision conflicts with decisions from other circuits is unsupported and meritless.

ARGUMENT

A. THE CORRECT STANDARD WAS USED TO PROPERLY DISMISS PETITIONERS' DAMAGE CLAIMS FOR FAILURE TO STATE A CLAIM AND IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR ANY CIRCUIT.

Petitioners argue that the district court must have used the wrong standard in dismissing their claims pursuant to Fed. R. Civ. P. 12(b)(6) because the standard as enunciated by this Court was not quoted or cited in the district court's order of dismissal. What Petitioners fail to realize is that the district court relied on a Sixth Circuit Court of Appeals decision which cites the *Conley* standard, *Westlake* v. *Lucas*, 537 F.2d 857 (6th Cir. 1976). The court of appeals ruled that the district court used and

applied the proper standard even though it was not specifically quoted in the order of dismissal.

In reviewing the dismissal for failure to state a claim, the court must accept all well pleaded facts as true and view them in the light most favorable to the Plaintiffs. *Holloway* v. *Walker*, 765 F.2d 517, 519 (5th Cir. 1985) and *Lowe* v. *Letsinger*, 772 F.2d 308, 311 (7th Cir. 1985). In appraising the sufficiency of a complaint, it should not be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. **The court must focus on the facts pled, not Petitioners' conclusions regarding what the facts mean**, in determining whether Petitioners have shown they are entitled to relief. *Westlake*, 537 F.2d at 858, *United States Medical Corp.* v. *M.D. Buyline, Inc.*, 753 F. Supp. 676, 678 (S.D. Ohio 1990) and 27 Fed. Proc., L.Ed., § 62:468.

The court of appeals found that "although the district court did not cite the *Conley* test, it is clear . . . that the court found there was no set of facts that would allow these Plaintiffs to recover against Judge Conlin." (Appendix A: p. 5). Even if the court failed to use the appropriate standard, the error was harmless because, as demonstrated below, the court did not err in dismissing Petitioner's claims under *Conley*, 355 U.S. 41.

Petitioners next argue that they should have been given an opportunity to amend their complaint. It is important to note that Petitioners never requested leave to amend after dismissal of their claims. Accordingly, the issue was not decided by the court of appeals and cannot

be considered by this Court as grounds for reversal. *Ashelman* v. *Pope*, 793 F.2d 1072 (9th Cir. 1986) and *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977).

B. PETITIONERS' CLAIMS FOR DAMAGES WERE PROPERLY DISMISSED AS THERE WERE NO FACTUAL ALLEGATIONS WHICH WOULD DEFEAT JUDICIAL IMMUNITY. THIS DECISION DOES NOT CONFLICT WITH ANY OTHER CIRCUIT.

Judicial immunity has been the settled doctrine of the common law for many centuries. *Bradley* v. *Fisher*, 13 Wall. 335, 347 (1871). In *Bradley*, the United States Supreme Court reaffirmed the fact that a judge is immune from civil liability for judicial acts within the jurisdiction of the court. *Bradley*, 13 Wall. at 347. Like other forms of immunity, judicial immunity is immunity from suit, not just from assessment of damages. *Mireles* v. *Waco*, 112 S. Ct. 286 (1991).

> "[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the

> judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend." *Bradley*, 13 Wall. at 351-52.

The policy rationale behind the doctrine was summarized by the court in *Holloway*, 765 F.2d at 522:

> "[F]irst, and most important, a judge must be free to act upon his own convictions, without apprehension of personal consequences to himself; second, the controversiality and importance of the competing interests in contest before a court make it likely that the inevitable losing party may be overly willing to ascribe malevolent motives to the judge; third, judges faced with the prospect of damages actions would be driven to wasteful and distractive self-protection devices, such as excessive record-keeping; fourth, alternative remedies such as appeal and impeachment reduce the need for private rights of action against judges; and, fifth, the ease of alleging bad faith would make a qualified "good faith" immunity virtually worthless. *Bradley*, 13 Wall. at 347-54. These factors retain their vitality today. *Butz v. Economou*, 348 U.S. 478, 98 S.Ct. 2894, 2912, 57 L.Ed.2d 895 (1978). To them, one may add the need for finality of judgment."

Immunity can only be overcome in two sets of circumstances.

> "First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Forrester v White, 484

> US, at 227-229, 98 L Ed 2d 555, 108 S Ct 538; Stump v Sparkman, 435 US, at 360, 55 L Ed 2d 331, 98 S Ct 1099. Second, a judge is not immune for actions, although judicial in nature, taken in the complete absence of all jurisdiction. Id., at 356-357, 55 L Ed 2d 331, 98 S Ct 1099; Bradley v Fisher, 13 Wall, at 351, 20 L Ed 646." *Mireles*, 112 S. Ct. at 287.

The courts have struggled with developing a definition of "judicial act." *See Stump* v. *Sparkman*, 435 U.S. 349 (1977) and *Mireles*, 112 S. Ct. 286.

> "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i. e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i. e.*, whether they deal with the judge in his judicial capacity." *Stump*, 435 U.S. at 362 and *Mireles*, 112 S. Ct. at 286.

Compare Supreme Court of Virginia v. *Consumers Union*, 446 U.S. 719 (1967) (promulgation of rules regarding attorney advertising was not a judicial act therefore judicial immunity did not apply, however, the court was immune from suit in its legislative capacity) *and Forrester* v. *White*, 484 U.S. 219 (1988) (judge was not immune for the administrative task of firing an employee).

The focus is on the "nature" and "function" of the act generally, not the specifics of the "act itself." "In other words, we look to the particular act's relation to a general function normally performed by a judge." *Mireles*, 112 S. Ct. at 288-289.

> "[I]f only the particular act in question were to be scrutinized, then any mistake of a judge in

> excess of his authority would become a 'non-judicial' act, because an improper or erroneous act cannot be said to be normally performed by a judge. If judicial immunity means anything it means a judge 'will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority.'" *Id.* at 288, citing *Stump*, 435 U.S. at 356.

The **entry of an order, even if it is erroneous or in violation of law or procedure, is a judicial act** if the order is entered in the context of a suit pending before the judge. *See Morrison* v. *Lipscomb*, 877 F.2d 463 (6th Cir. 1989). An **incorrect determination does not make the act any less judicial**. *Dykes* v. *Hosemann*, 776 F.2d 942 (11th Cir. 1985). The **manner in which the order is entered does not change the nature of the act for purposes of immunity analysis**. *See Sun* v. *Forrester*, 939 F.2d 924 (11th Cir. 1991), *Ashelman*, 793 F.2d 1072, and *Holloway*, 765 F.2d 517. Even the **misuse of the court's power is subject to immunity** if the ultimate act performed is a judicial function. *Id.* at 524. *See Ashelman*, 793 F.2d 1072 (fact that judge allegedly conspired with prosecutor was of no consequence when ultimate act was judicial in nature.) *See Sun*, 939 F.2d 924, (judge making **derogatory comments** toward Defendant **during sentencing** on a criminal matter constitutes a judicial act which is protected by judicial immunity.)

Many actions by judges have been determined to be judicial in nature. Determination of **when** to decide a case and notify the parties of the outcome is a judicial function, even if it takes four years. *Lowe*, 772 F.2d 308. Docket control is key to the proper workings of a court and is classified as a judicial function. *Dellenbach* v. *Letsinger*, 889

F.2d 755 (7th Cir. 1989). **Requiring payment of One Thousand Two Hundred ($1,200.00) Dollars prior to consideration of an appeal was found to be a judicial act of the trial judge**, which was not taken in the clear absence of jurisdiction. *Dellenbach*, 889 F.2d 755. **Enforcement of the court's own orders, by contempt or otherwise, is a judicial function**. *Patten* v. *Glaser*, 771 F.2d 1178 (8th Cir. 1985).

Failing to follow proper procedure, substantive law or directives of the higher courts do not make an act any less judicial in nature. *Rolleston* v. *Eldridge*, 848 F.2d 163 (11th Cir. 1988), *Decker* v. *Hillsborough County Attorney's Office*, 845 F.2d 17 (1st Cir. 1988), and *Holloway*, 765 F.2d 517. **Even improperly refusing to accord a litigant a hearing is an act to which immunity applies**. *Rolleston*, 848 F.2d 755 and *Decker*, 845 F.2d 17.

Entry of orders regarding custody, visitation, and support, as well as contempt proceedings for violation of those orders, **including jail sentences, are judicial acts to which immunity attaches**. *Patten*, 771 F.2d 1178. Presiding over ex parte hearings which result in restriction of a family law litigant's visitation rights is a judicial act taken within the subject matter jurisdiction of the court.

There can be no question that the court of appeals correctly determined that immunity applies. Petitioners' bold assertion that the "Sixth Circuit's views on judicial immunity are far more limiting" than this Court intended, has no merit. Petitioners offer no support for their conclusions. Rather than attempt to prove the negative, Respondent relies on the cases cited above. If the Sixth Circuit's view on judicial immunity were improper,

Petitioners have failed to specifically identify cases which support their position.

The second aspect of judicial immunity involves the judge's jurisdiction. It has long been held that a judge is immune unless he acted in the "clear absence of all jurisdiction." *Bradley*, 13 Wall. at 351, *Stump*, 435 U.S. at 357, and *Mireles*, 112 S. Ct. at 287. The inquiry looks at **subject matter jurisdiction** of the court. *Stump*, 435 U.S. at 356. *Compare Maestri* v. *Jutkofsky*, 860 F.2d 50 (2nd Cir. 1988) (town justice acted in the clear absence of jurisdiction where he acted beyond his territorial limits) *and Dykes*, 776 F.2d 942 (judge was immune where he lacked personal jurisdiction over the Defendant because he had subject matter jurisdiction over the action). The scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. *Stump*, 435 U.S. at 356. The question is whether the court has the **power** to consider the question before it, rather than dismissing the litigant's claims for lack of jurisdiction. *Stump*, 435 U.S. 349. **That a decision was made incorrectly does not affect the fact that it was within the judge's power to make it.** *Dykes*, 776 F.2d at 947.

A distinction must be drawn between an act in the complete absence of jurisdiction, for which there is no immunity, and an act which is merely **in excess** of jurisdiction for which a judge is immune.

> "In *Bradley*, the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and

> would not be immune from liability for his actions; on the other hand, if a judge of a criminal court should convict a Defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. *Id.*, at 352." *Stump*, 435 U.S. at 357 n. 7.

A judge is immune even if he commits grave procedural errors, makes an erroneous decision, enters an order in violation of statute or law, erroneously acts when exclusive jurisdiction is in the court of appeals, or fails and refuses to follow orders of a higher court. *Stump*, 435 U.S. 349, *Dellenbach*, 889 F.2d 755, *Rolleston*, 848 F.2d 163, *Decker*, 845 F.2d 17, *Patten*, and *Holloway*, 771 F.2d 1178. Such acts are merely in excess of the judge's jurisdiction and are within the realm of judicial immunity.

A review of the well pleaded facts from Petitioners' complaint reveals that all acts complained of were judicial acts which were not taken in the clear absence of all jurisdiction. Judge Conlin is a judge of Michigan's Circuit Court, sitting in Washtenaw County. Circuit courts are courts of general jurisdiction with original jurisdiction to hear domestic relations actions. (Appendix E: Mich. Comp. Laws § 600.601 and 600.605 1968.) Circuit courts also have the jurisdiction and power to fully effectuate and enforce their judgments and orders. (Appendix E: Mich. Comp. Laws § 600.611 1968.)

Mann and Kish both make several allegations that Judge Conlin acted without jurisdiction because he took certain actions while issues were pending on appeal. (Appendix B: pp. 38a-39a, ¶30 and pp. 42a-43a, ¶35. Appendix C: pp. 53a-54a, ¶3-4 and p. 56a, ¶8.) At the outset, it should be noted that it is not always easy, in

domestic relations actions, to determine whether a court has jurisdiction to consider particular issues where other issues have been appealed.[4] *Bradley*, 13 Wall. at 352 and *Stump*, 435 U.S. at 356. In fact, Thorson complains of the exact opposite conduct, i.e., that Judge Conlin refused to hear a motion while another issue was on appeal. (Appendix B: pp. 30a-31a, ¶22.) The law regarding custody, visitation, and support is interwoven. A decision in one area will impact on the others. However, this Court need not consider the propriety of Judge Conlin's actions. Federal courts have clearly ruled time and time again that **an action taken by a judge while jurisdiction is in the court of appeals is merely in excess of his authority and does not defeat immunity**. *Dellenbach*, 889 F.2d 755 and *Rolleston*, 848 F.2d 163. *See also Decker*, 845 F.2d 17 (judge immune for failing to grant a hearing on matters within jurisdiction of the court).

There are no other **factual** allegations in either the amended complaint or the proposed intervenor's complaint which attack the judge's jurisdiction. All that remains regarding this aspect of immunity are Petitioners' **conclusions** that Judge Conlin acted without jurisdiction. There are no facts which support such conclusions. The court must consider only the facts and draw its own conclusions. *Holloway*, 765 F.2d at 519, *Lowe*, 772 F.2d at 311, and *Westlake*, 537 F.2d at 858.

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[4] In such cases, the court has the continuing power to amend its previous judgments or orders regarding child custody, visitation or support for proper cause shown or because of a change of circumstances. (Appendix E: Mich. Comp. Laws § 722.27 1970.)

There are several allegations by each Petitioner that Judge Conlin acted outside his judicial function. In each case, the ultimate conduct complained of was a judicial act. Thorson alleges that Judge Conlin acted outside his judicial capacity by requiring him to pay his wife's attorney fees on three separate occasions prior to obtaining a hearing and by requiring him to pay his wife's lost wages as a condition of granting his motion to adjourn. (Appendix B: pp. 27a-35a, ¶19-23.) The Michigan Court Rules grant Judge Conlin the power to enter orders that one party's attorney fees be paid by the other side. The court rules also allow a judge the discretion to impose costs and conditions in granting an adjournment. (Appendix E: Mich. Ct. R. 3.206(A), 2.503(D).) Entry of the orders complained of by Thorson were judicial acts authorized by the court rules.

The remaining allegations of Thorson are aimed at the claim that various orders were entered in violation of law or procedure. That does not make them any less judicial in nature. *Rolleston*, 848 F.2d 163, *Decker*, 845 F.2d 17, and *Holloway*, 765 F.2d 577. Based on the **facts** pled by Thorson, all of his claims for damages are barred by judicial immunity.

Mann and Kish allege that Judge Conlin entered a number of erroneous orders. (Appendix B: pp. 37a-43a, ¶29-35, and Appendix C: pp. 53a-57a, ¶3-9.) Violations of procedural rules and entry of erroneous decisions are judicial acts which are accorded judicial immunity by the courts. *Rolleston*, 848 F.2d 163, *Decker*, 845 F.2d 17, and

Holloway, 765 F.2d 577. Petitioners' proper avenue is to appeal, not to sue the judge.[5]

In summary, Petitioners have not alleged facts which avoid the immunity bar. All acts complained of by Petitioners were judicial in nature and within the subject matter jurisdiction of the court. Their claims for damages[6] were therefore properly dismissed.

C. THE COURT OF APPEALS PROPERLY ABSTAINED FROM CONSIDERING PETITIONERS' REQUEST FOR PROSPECTIVE INJUNCTIVE RELIEF. THIS DECISION DOES NOT CONFLICT WITH ANY OTHER CIRCUIT.

The court of appeals properly affirmed the district court's dismissal of Petitioners' claims for declaratory and injunctive relief based on the abstention doctrine as

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[5] There are other remedies available to Plaintiffs. A request for rehearing or appeal are the most obvious ones. However, the Court Rules provide a procedure whereby an individual can request a writ of superintending control to compel a judge to perform his duties. (Appendix E: Mich. Ct. R. 3.301, 3.302.) An alternate remedy is available to Plaintiffs through the democratic process. They could simply campaign against the judge to have him removed from office. *See Bradley*, 13 Wall. at 350.

[6] Respondent acknowledges that judicial immunity does not bar Petitioners' claims for prospective relief. However, these claims are now moot because their cases have been transferred to other trial judges. The federal courts have consistently held that declaratory or injunctive relief should not be granted in the absence of a live case or controversy. Once the claim is no longer pending before the Respondent judge, prospective relief should be denied. *Ashelman*, 793 F.2d 1072, *Hansen* v. *Ahlgrimm*, 520 F.2d 768 (7th Cir. 1975), and *Fowler* v. *Alexander*, 478 F.2d 694 (4th Cir. 1973).

set forth by *Younger* v. *Harris*, 401 U.S. 37 (1971) and its progeny. On appeal, Petitioners argue that the doctrine does not apply to cases arising out of 42 U.S.C. § 1983 because several courts addressing cases arising under § 1983 declined to abstain. This argument has no merit. Ironically, the *Younger* doctrine was developed in the context of § 1983. *Aristocrat Health Club of Hartford, Inc.* v. *Chaucer*, 451 F. Supp. 210, 214 (D. Conn. 1978).

The fact that some courts declined to abstain in a § 1983 case simply indicates that the doctrine is not applicable in all circumstances. However, the abstention doctrine was developed for cases similar to the one at bar.

> "In *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the Supreme Court held that, absent 'extraordinary circumstances,' considerations of comity and federalism require the federal courts to abstain from enjoining pending criminal proceedings in state court. In subsequent cases, the court extended the doctrine of *Younger* to require abstention when the relief sought in federal court would interfere with ongoing state *civil* proceedings involving matters of special concern to the states." (Citations omitted. Emphasis in original.) *Cobb* v. *Green*, 611 F. Supp. 873, 873-874 (W.D. Mich. 1985).

Younger, 401 U.S. 37, and the subsequent cases espouse a strong federal policy against federal court interference with pending state judicial proceedings. *Carras* v. *Williams*, 807 F.2d 1286, 1290 (6th Cir. 1986). *See also Middlesex County Ethics Committee* v. *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). Abstention serves the policies of comity and federalism by preventing the federal courts from "unduly interfer[ing] with the legitimate activities

of the States." *Carras*, 807 F.2d at 1290, citing *Younger*, 401 U.S. at 44.

The abstention doctrine has been applied in cases similar to this one. In *Patten*, 771 F.2d 1178, a domestic relations litigant sued the judge presiding over his divorce case. The judge had entered several orders regarding custody, visitation, and support. Following non-compliance with the orders, the judge held contempt hearings and found both parties in contempt of court, sentencing them to five day jail sentences. The husband sued for injunctive relief and damages alleging that the judge had held him in contempt and imprisoned him in violation of his constitutional rights and without jurisdiction. After finding that plaintiff's claims for damages were barred by judicial immunity, the court abstained from hearing the remaining claims for prospective relief.

In a similar case, *Holeman*, 732 F. Supp. 726 (S.D. Tex. 1990), a domestic relations litigant sued a judge for violating his due process rights by holding ex parte hearings which resulted in a restriction of plaintiff's child visitation rights. The court initially determined that plaintiff's claims for damages were barred by judicial immunity and then went on to consider plaintiff's request for injunctive relief. The court determined that the claim for injunctive relief must be dismissed for two reasons.

> "First, 'there is a well established policy that **federal courts should abstain from exercising jurisdiction in domestic relations cases**.' Plaintiff argues a cause of action challenging the family court rulings that allegedly restricted his visitation rights. Plaintiff has not attacked the

> constitutionality of the rules or statutes governing the family court's procedures. Instead, Plaintiff's claims against Judge Elliott are 'enmeshed' in the underlying domestic relations controversy, which is a state – not federal – concern.
>
> Second, Plaintiff's claims are merely collateral attacks on the state court's judgment in the guise of a civil rights action. Plaintiff is, in essence, seeking a reversal in the federal court of a state court judgment. This court does not have jurisdiction to review the constitutionality of a judgment rendered in a state court. Plaintiff's proper course of action is to appeal the family court's ruling through the Texas state appellate courts to the United States Supreme Court." (Citations are omitted.) *Holeman*, 732 F. Supp. at 727.

See *Moore* v. *Sims*, 442 U.S. 415 (1979) (child custody involving alleged child abuse), *Huynh Thi Ahn* v. *Levi*, 586 F.2d 625 (6th Cir. 1978) (procedures and remedies provided under the Michigan Adoption Code), *Ward* v. *Hekman*, 497 F. Supp. 454 (1980) (challenging the constitutionality of an adoption decision), and *Cobb*, 611 F. Supp. 873 (1985) (civil contempt for non-payment of child support). These cases suggest family law and child custody are issues of paramount concern to the state.

Under the *Younger* doctrine as it has developed over the years, a federal court should decline to hear a case in which:

> (1) a federal court is called upon to enjoin a state judicial proceeding;

(2) the state proceeding implicates vital state interests; and

(3) the state proceeding provides an adequate opportunity to raise constitutional challenges. *Carras*, 807 F.2d at 1290 citing *Middlesex County*, 457 U.S. at 432.

All three Petitioners in this action have domestic relations cases pending in Washtenaw County Circuit Court. As demonstrated by the cases cited above, child custody, divorce, and other family law matters are vital state interests. Each Petitioner was afforded an opportunity to raise constitutional challenges to Judge Conlin's actions by way of appeal to the Michigan Court of Appeals, Michigan Supreme Court, and, ultimately, the United States Supreme Court. Petitioners have not attempted to avail themselves of this remedy with respect to many of the claimed violations by Judge Conlin.[7] Those that were appealed met with mixed reactions by the court. In some instances, Judge Conlin's actions were upheld and sometimes he was reversed. The Michigan Court of Appeals is not acting as a "rubber stamp" for the Respondent.

To avoid application of the *Younger* doctrine, this court must find that "extraordinary circumstances" exist. Courts have found that extraordinary circumstances exist

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[7] On at least one occasion, Plaintiffs failed to argue the claimed constitutional violations on appeal. In *Thorson* v. *Thorson*, unpublished opinion per curiam of MI. Court of Appeals, (Docket No. 133933), the Court stated, "defendant's equal protection argument has been abandoned on appeal because of defendant's failure to identify any relevant supporting authority. *In re Toler*, 193 Mich App 474, 477, 484 NW2d 672 (1992)."

where the state courts have indicated that they would not redress plaintiff's claimed constitutional violations. *See McKinstry* v. *Genesee County Circuit Judges*, 669 F. Supp. 801 (E.D. Mich. 1987). However, courts have found that extraordinary circumstances did **not** exist where the plaintiffs had an opportunity to raise their constitutional challenges in the state courts but did not avail themselves of that opportunity. *See Cobb*, 611 F. Supp. 873, and *Sevier* v. *Turner*, 742 F.2d 262 (6th Cir. 1984).

The existence of extraordinary circumstances is illustrated by a comparison of *Cobb*, 611 F. Supp. 873 and *McKinstry*, 669 F. Supp. 801. In both cases, plaintiffs sued trial judges challenging the courts' practice of refusing to appoint counsel to represent indigent defendants at hearings on charges of contempt of court for failure to comply with child support orders. The plaintiff in *Cobb*, 611 F. Supp. 873, argued that "extraordinary circumstances" were present because the Michigan Supreme Court had ruled in *Sword* v. *Sword*, 249 N.W.2d 88 (1976) that no general due process right to counsel exists in civil non-support contempt proceedings. This ruling was in contradiction to a subsequent United States Supreme Court decision, *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981). The *Cobb*, 611 F. Supp. 873, court determined that circumstances had changed since the Michigan Supreme Court's ruling in *Sword*, 249 N.W.2d 88, therefore it was possible that the Michigan Court of Appeals would follow *Lassiter*, 452 U.S. 18, rather than *Sword*, 249 N.W.2d 88, in ruling on plaintiff's case. Accordingly, the *Cobb* court abstained finding that an appeal to the state courts would not have been fruitless. *Cobb*, 611 F. Supp. 873.

The *McKinstry*, 669 F. Supp. 801, court was facing vastly different circumstances. By this time, the Michigan Court of Appeals had ignored *Lassiter*, 452 U.S. 18, and denied an indigent father his right to appointed counsel prior to being jailed for contempt for non-payment of child support. Further, the Genesee County Circuit Judges indicated that they would not appoint counsel unless directed to do so by the federal court. The *McKinstry*, 669 F. Supp. 801, court determined that it was not possible for plaintiffs to have their federal claims redressed in the state courts. Consequently, the federal court appropriately became involved in the state court proceeding.

The courts have recognized that the abstention doctrine may have severe results. Nevertheless, it must be applied when failure to do so would result in undue interference with the conduct of state courts. As stated in *Cobb*, 611 F. Supp. at 877:

> "Admittedly, the result reached here seems a harsh one . . . Yet the result the court reaches is required if the federal courts are to honor the principles of comity and federalism that underlie the *Younger* doctrine. Under that doctrine, **the federal courts are not to interfere with state court processes unless the state appellate courts have exhibited an unwillingness to enforce plaintiff's federal constitutional rights.** *Sevier*, 742 F.2d at 271; *Parker* [v. Turner], 626 F.2d [1] at 10 [(6th Cir. 1980)]. This court can only assume that the Michigan courts will correctly apply the constitutional principles set forth in *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), if plaintiffs appeal their claims in those

> courts. **Especially in a case like this, where plaintiffs ask a federal court to grant equitable relief that will affect the day-to-day conduct of state trial courts and possibly require ongoing supervision of state trial court judges, a federal court should not interfere when less intrusive avenues of relief are available.** *Parker*, 626 F.2d at 7, 8."

In the case at bar, Petitioners all have ongoing cases pending in the state circuit court and court of appeals. They are asking this court to become involved in the day-to-day handling of family law cases by a state circuit judge. Petitioners request equitable, declaratory, and injunctive relief against Judge Conlin, including ordering that he "(i) refrain from hearing any domestic family matters; (ii) amend his policies and practices in the specific manners herein complained of to stop his infringement of constitutional rights in his courtroom and in the administration of business of his court; (iii) institute internal record keeping procedures, and surveillance, to insure compliance with these orders." Petitioners also request declaratory and injunctive relief particular to their own cases. (Appendix B: pp. 48a-51a and Appendix C: pp. 62a-65a.)

It is exactly this type of state court intrusion that the abstention doctrine was designed to eliminate. Petitioners' complaint fails to allege extraordinary circumstances to avoid operation of the doctrine. The Petitioners in this case cannot show that the state court of appeals is unwilling to address and remedy any claimed violations of Petitioners' constitutional rights. In fact, Petitioners, as in *Cobb*, 611 F. Supp. 873, have not appealed many of the claimed constitutional violations. The *Younger* doctrine

was grounded in part on the fundamental requirement that a party must have no remedy available at law to seek equitable relief. Petitioners have an adequate remedy at law. They may appeal the various decisions, and seek redress of their constitutional claims in the state courts of appeal. Consequently, the court of appeals properly affirmed the district court's decision to abstain from hearing Petitioners' equitable claims.

CONCLUSION

As discussed above, the court of appeals correctly used the *Conley* standard in granting Respondent's motion to dismiss.

The court of appeals also properly found that Judge Conlin was protected by the cloak of judicial immunity because the acts complained of by Petitioners were judicial in nature and within the jurisdiction of Judge Conlin's court. Finally, the court of appeals properly abstained from considering Petitioners' claims for prospective injunctive relief finding that Petitioners' had failed to allege the necessary extraordinary circumstances required to overcome application of the abstention doctrine.

Petitioners' assertion that this is a nationally important case is embarrassing. Petitioner asserts that "the legal system is currently in a downswing-failing to meet its awesome responsibility." However, the legal system provides these Petitioners ample opportunity to challenge Judge Conlin's decisions. These Petitioners have repeatedly failed to take advantage of their right to

appeal. Instead, they are attempting to convince the federal judiciary to oversee the day to day operations of the Washtenaw County Circuit Court because they are dissatisfied with the manner in which Judge Conlin runs his courtroom.

Imagine the burden on the federal courts if they were charged with overseeing the domestic relation cases heard by state judges. Inevitably, in these cases, one of the parties becomes disgruntled by the divorce proceeding. If this court were to grant Petitioners' request, the floodgates would open, inundating every federal court with claims of judicial misconduct.

Petitioners' unsupported assertion that the court of appeals decision is in conflict with other circuits should not justify the granting of their Petition for Writ of Certiorari. Petitioners repeatedly make assertions that the court of appeals decision is inconsistent with prior decisions of this Court. However, upon review, these assertions prove to be meritless. The court of appeals decision is amply supported by the caselaw of this court. Additionally, Respondent has been unable to identify any conflict with any other circuit. For all of these reasons,

Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: August 31, 1994

No. 94-101

In The

Supreme Court of the United States

October Term, 1994

SHELLY L. MANN; ROBERT W. THORSON, individually and as representatives of the class, and BEVERLY KISH,

Petitioners,

vs.

PATRICK J. CONLIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

APPENDIX TO BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

APPENDIX E

MCL 600.601

Circuit courts have the power and jurisdiction

(1) possessed by courts of record at the common law, as altered by the constitution and laws of this state and the rules of the supreme court, and

(2) possessed by courts and judges in chancery in England on March 1, 1847, as altered by the constitution and laws of this state and the rules of the supreme court, and

(3) prescribed by rule of the supreme court.

MCL 600.605

Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.

MCL 600.611

Circuit courts have jurisdiction and power to make any order proper to, fully effectuate the circuit courts jurisdiction and judgments.

MCL 722.27(1)

If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen accidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may:

. . .

(c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age, and, subject to section 4a, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

. . .

(f) Take any other action considered to be necessary in a particular child custody dispute.

MCR 3.206(A)

(1) In any domestic relations action, either party may request that the court order the other spouse to pay an attorney a specified sum to enable that party to prosecute or defend the action.

. . .

(3) The Court may order that a necessary and reasonable sum be paid to the attorney, either directly by the other spouse or from the spouse's assets over which the court has jurisdiction.

MCR 2.503(D)

(1) In its discretion the court may grant an adjournment to promote the cause of justice. An adjournment may be entered by order of the court either in writing or on the record in open court, and the order must state the reason for the adjournment.

(2) In granting an adjournment, the court may impose costs and conditions. When an adjournment is granted conditioned on payment of costs, the costs may be taxed summarily to be paid on demand of the adverse party or the adverse party's attorney, and the adjournment may be vacated if nonpayment is shown by affidavit.

MCR 3.301(A)

(1) A civil action or appropriate motion in a pending action may be brought to obtain

(a) superintending control,
(b) habeas corpus,
(c) mandamus, or
(d) quo warranto.

Unless a particular rule or statute specifically provides otherwise, an original action may not be commenced in the Supreme Court or the Court of Appeals if the circuit court would have jurisdiction of an action seeking that relief.

(2) These special rules govern the procedure for seeking the writs or relief formerly obtained by the writs, whether the right to relief is created by statute or common law. If the right to relief is created by statute, the limitations on relief in the statute apply, as well as the limitations on relief in these rules.

(3) The general rules of procedure apply except as otherwise provided in this subchapter.

MCR 3.302(A)

A superintending control order enforces the superintending control power of a court over lower courts or tribunals.

MCR 3.302(D)

(1) The Supreme Court, the Court of Appeals, and the circuit court have jurisdiction to issue superintending control orders to lower courts or tribunals. In this rule the term "circuit court" includes the Recorder's Court of the City of Detroit as to superintending control actions of which that court has jurisdiction.

(2) When an appeal in the Supreme Court, the Court of Appeals, the circuit court, or the recorder's court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.